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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

VS.

NEW MOTOR VEHICLE BOARD, et al,
Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. The State of California violates the First Amendment rights of a franchisee when it establishes, as good cause for non-continuance by the franchisor of the franchise agreement, a letter sent to the United States Senate Commerce Committee at the request of the Committee; communication with the Special Assistant Attorney General of the State of Rhode Island and with the Department of Consumer Affairs of the State of California suggesting that present General Motors warranty practices may violate the law.

Franchisees are entitled to petition the government for redress of their grievances without fear of retaliation by powerful franchisors assisted by state government.

II. The State of California adopted the "good cause" standard of restricting a franchisee's expression of wrongdoing of the franchisor tendered by General Motors and assisted General Motors in later court review by filing briefs arguing against the First Amendment rights of 49er Chevrolet.

III. The State of California violates the First Amendment rights of a franchisee when it establishes as "good cause" for non-continuance of the franchise agreement by the franchisor the "pure speech" expression of a franchisee directed to the franchisor through letters and quiet discussion of the franchisee's belief that the franchisor's policies and procedures are unfair as applied to the franchisee and, possibly, unlawful and in violation of state and federal laws.

IV. General Motors' second termination letter in 1981, adding a reduction in Chevrolet passenger car sales as a second reason for non-renewal of 49er Chevrolet's franchise agreement, was an effort to cloud General Motors' real reason for non-renewal: That of objecting to 49er Chevrolet's First Amendment rights, the only reason for non-renewal in 1979.

PARTIES

Richard E. Wilmshurst, 49er Chevrolet, New Motor Vehicle Board of the State of California, Chevrolet Motor Division of the General Motors Corporation.

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VS.

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Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

JURISDICTIONAL STATEMENT

Appellants, Richard E. Wilmshurst and 49er Chevrolet, Inc., appeal from the decision of the Court of Appeal, Third Appellate District, of the State of California, filed on March 4, 1985, upholding the decision of the California New Motor Vehicle Board and the review by the Calaveras County Superior Court holding that under Section 3061 of the California Vehicle Code (California Automobile Franchise Act) the New Motor Vehicle Board's decision did not violate appellant's First Amendment rights to redress his grievances to the government and speak freely on issues of public importance. The within statement is submitted to demonstrate that this Honorable Court possesses jurisdiction over this appeal and the substantiability of the federal questions herein presented warrants immediate consideration and disposition by the Court.

OPINION BELOW

The opinion of the Court of Appeal, Third Appellate District, State of California, filed on March 4, 1985, in Civil Action No. 3 Civil 23426, has not been reported and is annexed hereto as "Appendix A."

JURISDICTION

The action below was commenced in the Calaveras County Superior Court by a petition for writ of administrative mandamus filed on January 5, 1982 to review the decision of the California New Motor Vehicle Board denying the protest of 49er Chevrolet, Inc. pursuant to California Vehicle Code Sections 3060, et seq.

The Statement of Decision of the Honorable Richard E. Tuttle and judgment sustaining the action of the New Motor Vehicle Board was filed on September 19, 1983.

Appeal was taken to the Court of Appeal, Third Appellate District, State of California on October 17, 1983 and the decision sustaining the California New Motor Vehicle Board and the Calaveras County Superior Court was filed on March 4, 1985. A petition for hearing was filed in the California Supreme Court and was denied on May 15, 1985.

Notices of appeal were filed in the Court of Appeal on July 15, 1985 and in the Calaveras County Superior Court on July 17, 1985. Copies of the Hearing denial by the California Supreme Court and the notices of appeal to the Court of Appeal, Third Appellate District, and the Calaveras County Superior Court were lodged with this Court on July 18, 1985 with an Application for Extension of Time to Docket Appeal.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 1257(2), authorizing appeal to the United States Supreme Court when the validity of a state statute is drawn in question as being applied in violation of First Amendment rights and the decision by the State of California was for its validity. *Cohen v. California* (1971) 403 U.S. 15, 91 S.Ct. 1780.

STATUTES INVOLVED

The California Automobile Franchise Act, wherein a vehicle franchisor may not terminate or refuse to continue a franchise agreement unless "good cause" standards are met as established by the California Legislature. These sections of the California Vehicle Code are set forth in "Appendix B."

PRELIMINARY STATEMENT AND SUMMARY OF THE CASE

The State of California has regulated the termination and non-renewal of new vehicle dealers' franchise agreements since 1973.[1]

This exercise of California's police power was declared by the Legislature for the purpose *"to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor* and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Emphasis added.)

The 1973 legislation, commonly known as the California Automobile Franchise Act, or "the Act," created numerous new requirements affecting the termination and non-renewal of existing franchises. Most important to the instant case are the "good cause" standards established by the Legislature and applied to the

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[1] 1973 Legislation. Sections 1, 38, 39, of Stats.1973 c.996, p. 1964 provided:

> "Section 1. The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally."

review of the termination or non-renewal of a dealer franchise by the New Motor Vehicle Board or "Board."

Under the Act, the franchisor is required to give notice to the franchisee and the Board setting forth the specific grounds for termination or refusal to continue the franchise. The franchisee may file a protest with the Board within specific time restraints that automatically stays the termination or non-renewal of the franchise until a "good cause" hearing has been held. In the protest hearing, the franchisor shall have the burden of proof to establish there is "good cause" to terminate or not continue the franchise agreement. (Cal. Veh. Code § 3060-§ 3066)

The elements of proof which the defending franchisor must establish are identified in California Vehicle Code Section 3061 which provides:

> In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:[2]
>
> (1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
>
> (2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
>
> (3) Permanency of the investment.
>
> (4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
>
> (5) Whether the franchise has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel for the motor vehicles handled by the franchise and has been and is rendering adequate services to the public.
>
> (6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

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[2] Amended by Stats. 1983, c.142, p. , § 161 as follows:
"..., but not limited to, *all of the following:*

(7) Extent of franchisee's failure to comply with the terms of the franchise.

The decision of the Board must be in writing and must contain findings of fact and determinations of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the proposed action of the franchisor is deemed approved. (Cal. Veh. Code § 3067)

General Motors Corporation or "GM" is a franchisor and 49er Chevrolet, Inc. and Richard E. Wilmshurst or "49er" is a dealer or franchisee under the Act.

On April 18, 1980, 49er filed a protest with the Board when GM notified it there would be a non-continuance of the franchise agreement. The basis of the GM decision not to continue the franchise relationship was based upon the expression of 49er that some of GM's policies and procedures were illegal. (Appendix F)

The hearing officer sustained the protest and the Board adopted the decision. GM appealed the Board's decision based upon the makeup of the Board. The Superior Court reversed, finding that the makeup of the Board was unconstitutional when the dealer members participated in the deliberation even though they did not vote when dealer issues were involved. The Court of Appeal, First Appellate District, sustained the reversal, the California Supreme Court denied a hearing and this Court denied certiorari.[3]

On September 18, 1981, 49er was notified the second time that GM did not want to continue the franchise relationship. The second notice established 49er's expression of GM's alleged wrongdoing, the decline of new passenger car sales since the last hearing, and dualling with Subaru, a Japanese vehicle as GM's basis for non-continuance of the franchise.

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[3] *Chevrolet Motor Div., General Motors Corp. v. New Motor Vehicle Board* (App. 1 Dist. 1983) 146 C.A.3d 533, 194 C.R. 270, certiorari denied ____ U.S. ____, 104 S.Ct. 1597, 1598.

The second decision found that 49er's expression was not justified and that 49er's new Chevrolet passenger car sales did not meet the Chevrolet sales available to 49er.

The Calaveras County Superior Court, on review, upheld the decision of the Board. On appeal, the Court of Appeal, Third Appellate District, affirmed the decision of the Board and Calaveras County Superior Court.

THE QUESTIONS BEFORE THE COURT ARE SUBSTANTIAL

I

THE STATE OF CALIFORNIA VIOLATES THE FIRST AMENDMENT RIGHTS OF A FRANCHISEE WHEN IT ESTABLISHES, AS GOOD CAUSE FOR NON-CONTINUANCE OF THE FRANCHISE AGREEMENT BY THE FRANCHISOR, A LETTER SENT TO THE UNITED STATES SENATE COMMERCE COMMITTEE AT THE REQUEST OF THE COMMITTEE; COMMUNICATION WITH THE SPECIAL ASSISTANT ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND WITH THE DEPARTMENT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA SUGGESTING THAT PRESENT GM WARRANTY PRACTICES MAY BE IN VIOLATION OF THE LAW.

FRANCHISEES ARE ENTITLED TO PETITION THE GOVERNMENT FOR REDRESS OF THEIR GRIEVANCES WITHOUT FEAR OF RETALIATION BY POWERFUL FRANCHISORS ASSISTED BY STATE GOVERNMENT.

Chief Justice Burger, when delivering the opinion of the Court in *McDonald v. Smith* (1985) ____ U.S. ____, 105 S.Ct. 2787 set forth:

> "The First Amendment guarantees the right of the people . . . to petition the Government for a redress of grievances. The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruik-*

> *shank*, 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared this right is implicit in [t]he very idea of government, republican in form. Id., 552. And James Madison made clear in congressional debate on the proposed amendment that people may communicate their will through direct petitions to the legislature and government officials. 1 Annuals of Congress 738 (1789)"

In 1978 the United States Senate Commerce Commission was investigating the manner in which major automobile manufacturers were handling new vehicle warranty with their dealers and consumers. At the invitation of the Committee 49er sent its comments. These comments alleged that GM participated in parts and labor price fixing in violation of state and federal laws. (Appendix D)

On October 23, 1979, the very next year, R. E. Cook, General Sales Manager of Chevrolet and Vice President of GM, sent 49er a letter of non-renewal specifically stating:

> "During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws.
>
> . . .
>
> For these reasons, Chevrolet Motor Division will not enter into a new Dealer Sales and Service Agreement with 49er Chevrolet following the expiration of the current Agreement." (Appendix F)

49er believed GM was violating the law in the manner in which it administered its warranty programs and expressed this belief to a U.S. Senate Committee. GM specifically states that this expression is the reason to terminate a franchise relationship that has been in existence over 45 years.

One of 49er's points of concern was the fact that GM establishes a lower warranty rate it pays the dealer rather than the rate charged retail consumers. In 1977, 49er provided information to the Special Assistant Attorney General of the State of Rhode

Island to assist in a suit regarding warranty rate price fixing. (Appendix C)

The Rhode Island litigation was the impetus that brought about change. In 1978 all major automobile manufacturers agreed to pay dealers at their current retail labor rate.

In May of 1978 49er participated in a public hearing before the State of California Consumer Affairs. 49er suggested to the Consumer Affairs Division that GM might be in violation of state law in applying its warranty policy in California. (Appendix E)

The participation by 49er in this process is at the essence of our governmental system. In *McDonald,* supra, this Court stated: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government", citing *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, 85 S.Ct. 209, 216.

It may be true 49er's expression may have challenged GM's policies, however, GM should have defended its position with speech rather than retaliation against a dealer who is participating in the basic function of a democratic society.

II

THE STATE OF CALIFORNIA ADOPTED THE "GOOD CAUSE" STANDARD OF RESTRICTING A FRANCHISEE'S EXPRESSION OF WRONGDOING BY THE FRANCHISOR, TENDERED BY GM, AND ASSISTED GM IN LATER COURT REVIEW BY FILING BRIEFS ARGUING AGAINST THE FIRST AMENDMENT RIGHTS OF 49ER

The California Legislature, when promulgating Vehicle Code Section 3061, does not establish as "good cause" for the non-renewal or termination of a franchise the expression of the franchisee relating to the wrongdoing of the franchisor. It was necessary for the Board to draft a "good cause" standard based upon free expression at the request of GM.

The "good cause" standard accepted by the Board, as requested by GM, became state action when it was used as a standard to

allow the non-renewal of the 49er franchise. At this point, the State removed itself from the required neutral position with regard to protected speech.

The State's involvement became even more pronounced and in violation of 49er's First Amendment Rights when the Attorney General of the State of California filed briefs in the Superior Court and Court of Appeal, supporting the (good cause) standard requested by GM.

In the Court of Appeal, the Attorney General closed the argument on 49er's First Amendment rights as follows:

> "This court should affirm the finding of the trial court, and hold that appellant's exercise of first amendment rights were not the basis of the Board's decision, and were in no way violated." (P.9)

There is no way one could measure the impact of the Attorney General of the State of California participating in the briefing of this action before the Court of Appeal. The state's participation in this proceeding on the side of GM could have been the deciding factor in the lower court's decision.

III

THE STATE OF CALIFORNIA VIOLATES THE FIRST AMENDMENT RIGHTS OF A FRANCHISEE WHEN IT ESTABLISHES AS "GOOD CAUSE" FOR NON-CONTINUANCE OF THE FRANCHISE AGREEMENT BY THE FRANCHISOR THE "PURE SPEECH" EXPRESSION OF A FRANCHISEE DIRECTED TO THE FRANCHISOR THROUGH LETTERS AND QUIET DISCUSSION OF THE FRANCHISEE'S BELIEF THAT THE FRANCHISOR'S POLICIES AND PROCEDURES ARE UNFAIR AS APPLIED TO THE FRANCHISEE AND POSSIBLY UNLAWFUL AND IN VIOLATION OF STATE AND FEDERAL LAWS

In 1978, 49er sent a certified letter to Mr. Murphy, Chairman of the Board of GM, advising him that GM policies were unfair and in violation of criminal anti-trust laws. (Appendix D, p. 34)

The court below cites several letters sent in 1978 (the same year 49er contacted the U.S. Senate Committee and the California Consumer Affairs) advising Chevrolet personnel that it was felt that some of GM's practices were in violation of the law and possibly criminal in nature. (Appendix A, p. 12-19)[4]

Each letter to GM set forth a policy that brought about an unfair or unlawful result in the franchise relationship. Expression of this type, although not directed to government, is protected by the First Amendment.

In the dissent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) ____ U.S. ____, 105 S.Ct. 2939, the standards of commercial speech were set forth:

> "In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. (Citations omitted.) [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 231-232, 97 S.Ct. 1782, 1797-1798.

The court below admits that 49er contends the franchise termination by GM contravenes 49er's First Amendment right to free speech, applied to the states through the Fourteenth Amendment.

The court stated:

> "Whatever role Wilmshurst's lawsuits and public statements may have had in Chevrolet's decision to end its relationship with 49er, it is clear the decision was premised *primarily*

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[4] The Board in the second hearing took judicial notice of the record of the first hearing as did the Superior Court. The same evidence that originally supported a finding in 49er's favor is now presented to support an adverse decision.

> upon Wilmshurst's continuous campaign of personal insults and attacks against Chevrolet's employees.
>
> . . .
>
> "If all Wilmshurst had done was file lawsuits and make statements to the press, 49er's contention might arguably have merit." (Appendix A, p. 19) (Emphasis added.)

The decision of the court below admits, in its opinion, that GM based its decision to terminate the 49er relationship, in part, on protected First Amendment rights but goes on to find that if the same expression made to government is also made to GM through its employees and they allege these expressions have disrupted the relationship, then 49er is no longer protected by the First Amendment.

The court below did not make an independent examination of the whole record and balance the total protected expression by 49er against GM's wrongdoing. This Court requires an independent review as was held in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) ____ U.S. ____, 104 S.Ct. 1949, 1958:

> ". . . cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan* (1964) 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729 (Balance of citations omitted.)

The court below does not mention that the same information sent to GM was also given to a U.S. Senate Committee and the State of California Consumer Affairs Division. The court below found its primary duty to determine if the decision below was supported by substantial evidence and in Footnote 1 only mentioned legislative and congressional bodies as if petitioning the government takes a back seat to the interests of GM.

IV

GM'S SECOND TERMINATION LETTER IN 1981, ADDING A REDUCTION IN CHEVROLET PASSENGER CAR SALES AS A SECOND REASON FOR NON-RENEWAL OF 49ER'S FRANCHISE AGREEMENT, WAS AN EFFORT TO CLOUD GM'S REAL REASON FOR NON-RENEWAL: THAT OF OBJECTING TO 49ER'S FIRST AMENDMENT RIGHTS, THE ONLY REASON FOR NON-RENEWAL IN 1979

The Board, the Superior Court and the Court of Appeal, skirted the First Amendment rights of 49er, by accepting GM's argument that 49er's downturn in passenger car sales, the first in 45 years, as the primary reason for non-renewal. There is no link between GM's intent to not continue 49er's franchise in 1979 for free expression and the sales issue tendered in 1981.

The Court of Appeal in *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corporation* (1980) 627 F.2d 44 made the following observation with regard to termination intent and timing:

> "Further, there is evidence that defendant formed intent to discontinue plaintiff well before the 1978 decline in plaintiff's sales of Rain Bird products became apparent (Tr. 331-34), thereby undermining any asserted link between plaintiff's post-acquisition conduct and defendant's decision to terminate."

It is obvious, it was GM's intent to terminate 49er in 1979 for speaking out about GM's manner of handling new vehicle warranty and not for any other reason.

Automobile manufacturers take exception to dealers speaking out in opposition to their activities. This was the case in *Swartz v. Chrysler Motors Corporation* (1969) 297 F.Supp. 834 when the district court granted a preliminary injunction preventing a dealer termination before a jury had an opportunity to make findings of fact.

In *Swartz,* Chrysler claimed it was terminating the franchise because of low sales, however, the court felt there was a real question as to the true reason:

> "It is a jury question whether Chrysler's action was motivated by honest business judgment or by personal animosity against plaintiff's president Samuel A. Liberto because of his prominent part in promoting opposition by privately-financed dealers to operation of 'factory-stores' or for other insufficient reasons."

In First Amendment cases the appellate court makes an independent review of the complete record in order to balance all the evidence to make sure First Amendment issues are not obscured by unrelated evidence.

CONCLUSION

State agencies should maintain their position of arbitrator in any dispute involving a franchisor and franchisee and not become involved with one side or the other in the proceedings. This is especially important in proceedings involving First Amendment rights of one of the parties and the state, as arbitrator, should be required to maintain a neutral position. However, states should be encouraged to promote and protect those who petition the government for a redress of grievances in accordance with the First Amendment.

In the automobile industry, the powerful automobile manufacturers are in a position to stifle the free flow of information from their franchisees. The chance of losing a franchise held for years or, possibly, one's livelihood places a "chilling effect" on any speech that is adverse to the thinking of the franchisor.

Every franchisee realizes his business is expendable when placed in relationship to the total business of the franchisor. Without a decision by this Court making it unlawful for industrial giants to stifle free expression about wrong doing and unsafe products by their franchisees, valuable information needed by government to enforce the laws and warnings to consumers of latent defects by sellers will never reach the marketplace.

Dated: September 12, 1985

RICHARD E. WILMSHURST
Appellant, Pro Se

Appendix A

In the Court of Appeal of the State of California
in and for the Third Appellate District
(Calaveras)

3 Civil 23426
(Super.Ct.No. 11169)

Richard E. Wilmshurst, etc.,
Petitioner,

vs.

New Motor Vehicle Board,
Respondent,

Chevrolet Motor Division of General Motors Corporation,
Real Party in interest and Respondent.

[Filed Mar. 4, 1985]

This appeal is the latest chapter in a saga involving the Chevrolet Division of General Motors ("Chevrolet") and the vocal owner of 49er Chevrolet ("49er"), Richard Wilmshurst, and arises out of Chevrolet's attempt to finally put an end to its long and stormy business relationship with 49er Chevrolet. 49er appeals from a judgment denying its petition for a writ of mandate directing the New Motor Vehicle Board ("Board") to set aside its decision that Chevrolet had "good cause" for refusing to renew 49er's automobile dealer franchise. 49er's thick brief is devoted primarily to allegations of criminal wrongdoing on the part of Chevrolet. However, Chevrolet is not on trial here on criminal charges. The primary issue before us is whether the Board's and trial court's decisions are supported by substantial evidence. We conclude they are and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On October 23, 1979, the general sales manager of Chevrolet, Mr. R. E. Cook, notified Richard Wilmshurst, president of 49er

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[1] The relationship between 49er and Chevrolet has been a fruitful source of litigation in both state and federal courts of all levels, and matters of controversy between the parties have been brought before this

Chevrolet in Angels Camp, that Chevrolet would not enter into a new automobile dealer franchise agreement with 49er after the expiration of the then-existing agreement. Setting forth the reasons for Chevrolet's decision, Mr. Cook stated: "During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws. You have even attempted to intimidate individual employes [sic] by, among other things, accusing them of deliberate misrepresentation, fraud and criminal misconduct, and by stating to them that they are placing themselves in jeopardy merely by carrying out their job responsibilities. This course of conduct has made it extemely difficult and unpleasant for our employes [sic] to deal with you and it has eroded and ultimately destroyed the trust, confidence and respect that is essential to any productive business relationship."

In April 1980, 49er filed a protest with the New Motor Vehicle Board to determine whether Chevrolet had "good cause" to refuse to renew the franchise. (Veh. Code, § § 3050, subd. (d); 3060, 3061.) 49er alleged its conducts was justified in the face of numerous illegal practices on the part of Chevrolet, the most significant of which include: (1) forcing 49er to provide warranty labor and parts below its cost of providing warranty service, in violation of Business and Professions Code section 17048.5 and Civil Code sections 1793.5 and 1793.6; (2) violating the above provisions by imposing a strict 30-day limit on the submission of warranty billings; (3) increasing the prices of automobiles 49er has ordered for private retail consumer prior to 49er's receipt of official written notice of price increase, in violation of Vehicle Code section 11713.3; (4) coercing dealers into entering sales contests conditioned upon wagering entry fees, in violation of

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and other courts by way of writ, and before administrative tribunals and Legislative and Congressional bodies. We will not attempt to set forth such matters except as they are relevant to the discussion of the issues before us. Nor will we set forth in this section a detailed rendition of the facts leading to the termination of the relationship between 49er and Chevrolet; rather, we will relate the relevant facts in more detail in the discussion.

Penal Code section 337a and federal law; and (5) illegally fixing the prices which 49er charges to transportation companies for the repair of vehicle damages occurring during shipment.

From August to October 1980, the Board conducted a hearing generating nearly 5000 pages of testimony and numerous volumes of exhibits. The Board found that from the 1973 to 1980, Wilmshurst repeatedly accused Chevrolet employees personally of illegal and unethical acts, including violations of the Vehicle Code and other state and federal laws; harassment; price-fixing; economic coercion; theft; extortion; moral decay; dishonesty; fraud; misrepresentation; retaliatory practices; "covering up" wrongdoing; "dirty tricks", and conspiracy to commit illegal acts. Wilmshurst often intimated to Chevrolet employees that they would be personally subject to civil and criminal penalties, including jail terms.

The Board concluded "Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and required procedures as well as Chevrolet personnel charged with implementing such policies." However, it found "all the disputes between the parties involved, or had their origin in, Chevrolet's policies pertaining to reimbursement of 49er for sums owed to 49er by Chevrolet." The Board found "Wilmshurst's conduct disrupted the relationship between the parties" and in the absence of other circumstances "would be unjustified and inexcusable", but concluded Wilmshurst's "belief that Chevrolet's policies and procedures operated unfairly and illegally against his dealership was reasonable and held in good faith." Although the board did not condone "the manner and method chosen by Wilmshurst to attempt to rectify" the situation, it found Chevrolet's practices mitigated against allowing it to terminate the franchise, and concluded Chevrolet did not show "good cause."

On August 21, 1981, the Superior Court of San Francisco granted Chevrolet's petition for writ of mandate to set aside the Board's decision. The court concluded, inter alia, that participation of automobile dealer members of the Board in the deliberative process without participation of members representing manufacturers deprived Chevrolet of an impartial tribunal. The decision was affirmed by the Court of Appeal for the First

Appellate District. (Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal.App.3d 533.)[2]

After the Superior Court of San Francisco issued the writ of mandate in the first action, Chevrolet again notified Mr. Wilmshurst it intended to discontinue doing business with 49er, citing two reasons: "Since October 31, 1980, when the Dealer Sales and Service Agreement expired, you have continued to engage in the kind of conduct which caused Chevrolet not to offer 49er a new Agreement. Furthermore, during the first eight months of this year [1981], 49er sold only 10 Chevrolet automobiles; from *June through August of this year, 49er sold just five Chevrolet automobiles.*" (Original italics.)

On October 6, 1981, 49er filed a second protest with the Board. In a considerably shorter hearing, evidence was introduced on Wilmshurst's conduct since the first hearing and 49er's sales performance in Chevrolets for the first nine months of 1981.[3] The Board concluded: "Since the Board's hearing on the 1980 protest, Wilmshurst has continued to engage in conduct which the Board previously found to be disruptive of the relationship between the parties. The Board's prior decision indicated that the Board did not condone the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities. In spite of the Board's statements, Wilmshurst persisted in his disruptive course of conduct. [¶] Wilmshurst used threats of criminal, economic, and moral sanctions in his attempts to coerce and

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[2] In American Motors Sales Corp. v. New Motor Vehicle Board (1977) 69 Cal.App.3d 983, we held that participation of dealer members of the board in decisions on controversies between dealers and manufacturers was a denial of due process. Subsequently, the Legislature amended Vehicle Code sections 3050 and 3066 to provide dealer members "may participate in, hear, comment, or advise other members upon, but may not decide," controversies between dealers and manufacturers. (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) The court in *Chevrolet* held even this more limited participation was unconstitutional without participation by manufacturers. (At p. 541.)

[3] The Board and the trial court in this case also took judicial notice of the record of the first hearing.

intimidate Chevrolet's personnel . . . despite the fact that he did not believe Chevrolet's personnel or practices were in any way discriminating against 49er or himself personally. [¶] This conduct by Wilmshurst was unjustified and inexcusable in light of all the circumstances. Wilmshurst's conduct effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." The Board also found "the amount of business transacted by 49er was inadequate as compared to the business available to 49er" and "it would not be injurious to the public welfare for the franchise to be replaced and the business of 49er to be disrupted." The Board concluded Chevrolet established good cause under Vehicle Code section 3061 to discontinue doing business with 49er.[4]

On January 5, 1982, 49er filed a petition for writ of mandate directing the Board to set aside its decision. The court denied the petition, concluding the findings of the Board were supported by the weight of the evidence and constituted "good cause" for Chevrolet's action. The court entered judgment accordingly. From this judgment, 49er appeals.

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[4] Vehicle Code section 3061 provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, *but not limited to,* all of the following: [¶] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [¶] (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. [¶] (c) Permanency of the investment. [¶] (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [¶] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [¶] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [¶] (g) Extent of franchisee's failure to comply with the terms of the franchise." (Italics added.)

DISCUSSION

I

The primary issue on appeal is whether the decision below was supported by substantial evidence.[5] The Board based its determination of good cause primarily on two findings. First, it concluded "the amount of business transacted by 49er was inadequate as compared to the business available to 49er. Second, it found "Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and procedures as well as the conduct and character of the Chevrolet personnel charged with implementing such policies" and persisted in doing so following the 1980 protest hearing; that such conduct "was unjustified and inexcusable in light of all the circumstances" and "effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." The trial court found these conclusions were supported by the weight of the evidence. We examine each of these conclusions in turn.

A. Sales Performance For 1981

Viewing the evidence in the light most favorable to the judgment, the record discloses the following facts.

In August or September 1980, Mr. Wilmshurst directed the business of 49er Chevrolet toward an emphasis on selling used cars. He cited as reasons the low profits on new vehicles and a poor market for new U.S. cars. For similar reasons Wilmshurst sought and acquired a franchise for the sale of Subarus, Japanese-made cars. While he was in the process of obtaining the Subaru franchise, Mr. Wilmshurst stated in a letter to a Subaru executive, "it would appear that doing a good sales and service job for

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[5] The trial court exercised its independent judgment, reviewing the entire record and determining the findings and decision of the Board were supported by the weight of the evidence. Our review is thus limited to determining whether substantial evidence supports the findings of the trial court. (Patterson v. Central Coast Regional Com. (1976) 58 Cal.App.3d 833, 842.)

Subaru would be more rewarding than doing the same job for a major U.S. manufacturer."

In June 1981, 49er began joint operation as a Subaru and Chevrolet dealership. At the time, it had 11 Subarus in its inventory and seven Chevrolets.) By August 1981, 49er stocked 18 Subarus and only four Chevrolets. In September, 49er had 20 Subarus and six Chevrolets in its inventory.

After becoming a Subaru dealer 49er advertised the sale of Subarus on a local radio station and in two newspapers. Mr. Wilmshurst had no recollection or knowledge of whether 49er similarly advertised Chevrolets during the first nine months of 1981. However, from January 1, 1981, through April 1981, while 49er was exclusively a Chevrolet dealer, its vehicle advertising expenses totaled $907. From the time 49er became a Subaru dealer in June, until September 1981, it spent $3,862 on the advertisement of Subarus.

Between June 1 and September 30, 1981, 49er sold 41 Subaru vehicles while selling only five Chevrolet passenger cars. In the first nine months of 1980, 49er sold at retail 32 Chevrolet passenger cars and 84 Chevrolet trucks for a total of 116 Chevrolet vehicles. During the same period in 1981, 49er sold only 12 Chevrolet cars and 20 Chevrolet trucks for a total of 32 vehicles. The drop in car sales alone was 62.5 percent; the drop in truck sales was 76 percent. Car sales for Chevrolet's Oakland Zone as a whole (which encompasses Northern California and Hawaii) dropped only 7.3 percent. Within its district (encompassing 13 dealerships) 49er had the highest percentage drop in car sales in 1981. Of 136 dealerships in the Oakland Zone, only one had a higher percentage drop and sold fewer cars, and that dealership was in severe financial trouble at the time.

In analyzing 49er's sales penetration, Chevrolet compared the total number of new Chevrolets registered in 49er's area of sales responsibility from January to August 1981 with the number of new Chevrolets sold by 49er during that period. Twenty-six new Chevrolet cars were registered in the area while 49er sold only 11 new Chevrolet cars. This is described as a "pump-in" factor, indicating other dealers sold 15 of the Chevrolets registered

within 49er's area of sales responsibility. Sales of trucks in 49er's area of responsibility also showed a "pump-in" factor: 32 trucks were registered while 49er sold only 20 trucks. For 49er's district as a whole, as well as in the Oakland Zone, there was a "pump-out"; that is, more cars were sold within the district and the zone than were registered there.

Based on 49er's penetration of sales compared to the penetration for the Oakland Zone and the national average, 49er's performance was considered not effective.

The recited evidence provides substantial support for the Board's conclusion that the amount of business in Chevrolet vehicles transacted by 49er was inadequate compared to the business available to it.

49er does not dispute this evidence. Rather, it cites evidence on the record indicating more effective sales performance for past years. Such evidence is irrelevant; Chevrolet based its decision to discontinue the business relationship on poor sales performance in 1981.

49er also contends its decision to concentrate on the sale of used cars and Subarus was economically justified. This, too, is irrelevant. The mere fact 49er made a business decision that may have been sound from *its* standpoint does not militate against finding its performance in the sale of Chevrolets was inadequate from *Chevrolet's* standpoint. Chevrolet cannot be compelled to continue its relationship with a dealership that has virtually abandoned efforts to sell its cars, regardless of the reason. It is entitled to a dealership that will exert its best effort to sell Chevrolet vehicles.

Finally, 49er contends market conditions contributed to its poor sales performance. Assuming this was a contributing factor, it does not explain the fact 49er had the second lowest sales performance in the entire Oakland Zone in 1981. The evidence demonstrates 49er maintained a low inventory of Chevrolets and virtually ceased advertising them after it became a Subaru dealer. These factors affect sales performance.

The findings with respect to sales performance are supported by substantial evidence.

B. Wilmshurst's Conduct

From the outset, 49er has attempted to turn these proceedings into a trial over the legality and morality of Chevrolet's business practices. As we noted initially, Chevrolet is not on trial for criminal conduct in this case and we shall make no determination with respect to its innocence or guilt of wrongdoing. We accept that Mr. Wilmshurst could have believed in good faith that Chevrolet's practices violated certain state and federal laws, although, like the trial court, we find no evidence clearly establishing Chevrolet violated any law. The question before us is whether substantial evidence supports the findings that Mr. Wilmshurst's conduct toward Chevrolet in seeking redress of his grievances was "unjustified and inexcusable" and "precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." A sampling of Mr. Wilmshurst's correspondence provides more than ample evidence in support of the findings.

The strained relations between 49er and Chevrolet appear to have originated in Mr. Wilmshurst's dissatisfaction with Chevrolet's warranty practices. Mr. Wilmshurst has asserted throughout that Chevrolet pays for warranty work at a price below 49er's cost of doing such work and places an unjustifiably short time limitation on the submission of warranty bills. As a result, Wilmshurst began submitting bills for warranty work at a cost greater than that set by Chevrolet's formulas. After conducting an audit of 49er in 1973, Chevrolet found it had overpaid some $3,000 in warrant claims to 49er and it charged back this amount to 49er's and Chevrolet's mutual account. When 49er refused to pay this charge, Chevrolet began sending parts to 49er on a C.O.D. basis. In a letter to Chevrolet's zone manager, Wilmshurst accused him personally of acting in bad faith and called the act of putting him on C.O.D. "vicious."

In 1975, Wilmshurst sent a letter to the assistant general sales manager for Chevrolet stating, "the application of the criminal and civil antitrust status to General Motors [sic] mode of

operendi in the automobile warranty area . . . gives me a chill when I project the possible consequences. [¶] General Motors is not the innocent industrial giant who obeys the rules even when profit may be injured." He accused Chevrolet of "almost ruthless practices in the warranty area" and "using economic force to settle matters, rather than good faith review of issues that arise in the course of business."

The warrant controversy resurfaced in 1977, at which time Chevrolet again placed 49er on C.O.D. status. Wilmshurst accused Chevrolet's zone manager of engaging in "economic force" and threatened to "secure a temporary restraining order to correct any illegal action you might take." In another letter to the zone manager, Wilmshurst accused him of using "extortive methods of collecting this unauthorized charge."

Later, Wilmshurst stated to the president of General Motors "that Chevrolet's methods of fixing the dealer's warranty rates and warranty parts below the cost of doing business is a violation of civil and criminal anti-trust statutes." He stated the "warranty procedures produce the atmosphere of steal or be stolen from" and requested that Chevrolet "proceed in any disagreement with 49er Chevrolet in a manner that is not tortious . . . ." At the same time, he accused the zone manager of extortion and a "lack of business principal [sic] and moral decay," and stated, "the time may come where you may find yourself caught up in complex litigation as the General Electric executives who were indicted for price-fixing and were sentenced to jail terms." He implored the zone manager "to play according to societies [sic] rules; try it you might like it."

Wilmshurst accused Chevrolet's Western Area sales manager, Mr. Stacy, of "quasi-extortion" and "unilateral conversion" and suggested his position will "lead to the indictment of GM officials by a federal grand jury for price-fixing." He charged Stacy with making "Illegal charges to a California *mutual account* and forc[ing] collection of those amounts by destroying the service business of the objecting dealer." He also accused him of believing "General Motors was above the law" and stated he was subject to "litigation in several states." He implied Mr. Stacy was engaging "in unlawful acts for the purpose of profit," and stated

that if Chevrolet could not collect the disputed amount legally, "don't try to steal it."

The controversy reached a fevered pitch in 1978. On March 25, Wilmshurst sent a letter to the service manager for Chevrolet, Mr. Croft, detailing alleged criminal violations of the Business and Professions Code in the warranty practices. He stated, "After reviewing the Business and Professions Code it appears that all agents of General Motors Corporation along with G.M. itself are responsible for violations .... It also appears that such acts are crimes .... In this area it might be well to consult your attorney to establish your personal liability to a State penal action."

In a letter to Chevrolet's regional manager, Mr. Davidson, Wilmshurst made the same accusations of criminal violations and charged that Chevrolet "through unlawful acts has underpaid 49er Chevrolet in excess of $150,000 in the last ten years." Wilmshurst accused Mr. Davidson of "join[ing] with others to force the present program of parts pricing upon 49er Chevrolet."

In a letter to Mr. Stacy, Wilmshurst charged Chevrolet with another series of illegal acts. He accused Mr. Stacy of representing that General Motors "is above the requirements of the law" and contended placing 49er on C.O.D. status "was put into effect to attempt to coerce us into allowing you to extort funds from our business to subsidize your warranty costs", which is "unlawful under California law." He asserted Chevrolet personnel have failed to fill orders in violation of criminal statutes. He reiterated his contention that Chevrolet's warranty practices violated the law and could lead to "civil and criminal sanctions ...." He represented that the Attorney General's Office was of the opinion that General Motors was violating the law and suggested state authorities "are leaning toward the criminal process." Finally, he accused Chevrolet of "'*unfair trade practice*'" and "'Plumbers' like retaliation."

On May 22, 1978, Mr. Wilmshurst received a letter from Chevrolet's zone manager, Mr. West, in which West asked Wilmshurst to direct any correspondence regarding violations of the law to General Motors' counsel. Wilmshurst refused to contact General Motors' attorneys "as our close business relation-

ship demands that we deal directly." Wilmshurst continued to repeat allegations of criminal wrongdoing, stating, "we have the basis of a prosecution: The People of the State of California vs. Employees for the Chevrolet Motor Division." He accused General Motors of "overreaching" and abuse of power.

On June 5, 1978, Wilmshurst wrote a letter to Mr. Stacy about a meeting between them at a new car showing in Las Vegas, described by Wilmshurst as a "clandestine hotel meeting," the purpose of which was to "put the squeeze on the little Chevy dealer from Angeles Camp." He accused Mr. Stacy of stating he "didn't care about California law," and asserted his actions "have been amoral and in violation of California law." He suggested that Mr. Stacy conduct himself "in such a manner in your business practices that you would not mind reading a recap of your business day on the front page of the Detroit Times." Wilmshurst accused Stacy of "personally us[ing] unlawful and malicious tactics to injure me and my business in order to force me to allow you to continue shortchanging my dealership for warranty work performed in violation of California law." He concluded, "You have taken your stand similar to Nixon's practice when he was quoted as saying, 'Stonewall 'em'. It didn't work in 'Watergate' and it won't work in 'Motorgate'."

On June 5, 1978, Chevrolet's attorney again requested that any charges of illegality be sent to him, and stating it was his opinion Chevrolet was not violating the law. Wilmshurst responded by stated the attorney's opinion "appears to be ill conceived" and evinced "a lack of understanding in GM warranty procedures and their application."

On August 9, 1978, Wilmshurst accused Mr. West of working together with Mr. Davidson and Mr. Croft "in an attempt to force 49er Chevrolet to provide warranty parts at prices below our cost as defined in § 17026 of the California Business and Professions Code." Wilmshurst penned another letter to Mr. West stating he "look[ed] forward to you making policy changes . . . that will assist in changing the image of General Motors from the giant unfair corporation to the business that not only deals in fine vehicles but fair business principles."

On September 19, 1978, Wilmshurst reasserted to Mr. West that Chevrolet's warranty practices violated the Business and Professions Code, and stated, "A person of average intelligence can understand from the statute what the elements of the violation would be."

On September 20, Wilmshurst complained to Mr. West about Chevrolet allegedly misrepresenting the date vehicle billings were received. He accused Chevrolet of criminal false pretenses and stated, "your procedure is laced with fraud and your failure to correct these known overbillings amount to the element of intent." The same day, Wilmshurst stated in another letter to Mr. West that certain of Mr. West's letters in response "appear to be some form of harassment with regard to vehicle billing and payment." He again accused Chevrolet of intentional fraud. On September 25, Wilmshurst restated his charges of misrepresentation in billings.

On October 17, 1978, a controversy arose when Wilmshurst accepted Mr. West's offer to enter a dealer contest. He complained about the entry fee, charging it was a solicitation of a wager in violation of section 337 of the Penal Code. He inisted that Chevrolet modify its contest "to conform to the [requirements of the] Penal Code statute cited above." Chevrolet's attorney responded with an opinion that the contest did not violate the Penal Code. Wilmshurst answered with a letter characterizing the attorney's opinion as "beyond belief as the product of a California attorney" and "made without a full understanding of the statute or factual circumstances involved therein." He accused the attorney of attempting to provide Chevrolet "with the defense of reliance upon the advice of competent counsel to the charges of criminal conduct," and suggested he was in violation of the Rules of Professional Conduct by assisting his client "in conduct the attorney knows, *or should know,* is illegal." He closed by telling the attorney, "we would appreciate your doing your homework and making that homework evident by giving some support to your off-the-cuff opinions."

On December 11, 1978, Wilmshurst again accused Mr. West of criminal misrepresentation in vehicle billings and stated, "your remedy of if you catch me I'll pay you back is absurd. You are not

being harrassed; you are being given good advice on the correction of an unlawful act within your control."

On December 15, Wilmshurst again accused Chevrolet of violating various statutes and complained to Mr. West about the forms he had to submit in order to receive reimbursement for overbilled vehicles, stating, "These f------ forms you send serve no logical purpose other than to delay compensating us . . . [¶] You could have processed this claim after we pointed out Chevrolet's error without returning it to us. More time is wasted with this B--S--- than is spent selling cars and satisfying Chevrolet customers."

On May 24, 1979, in a letter to Mr. West, Wilmshurst accused Chevrolet's district manager, Mr. Hill, of attempting to coerce 49er into participating in all of Chevrolet's programs. He stated, "Mr. Hill's parting comments were to the effect that he wasn't interested in servicing our dealership unless we had an open checkbook for every Chevrolet campaign that came down the pike so he could be rated as a proficient District Manager; . . . Mr. Hill indicated that he controlled our distribution of merchandise and that we had better play ball with him or we could deal directly with Mr. Mike Hoover or you if we wanted to have sold orders placed."

When Mr. West defended Mr. Hill's version of events, Wilmshurst accused Mr. West of "express[ing] the protective management philosophy 'you lie and I'll swear to it'." He suggested Mr. West defended Mr. Hill "because he is doing just what you have told him or you are a poor judge of character." He closed: "Most likely G.M.'s top management would not tolerate what goes on in Chevrolet's dealings with its small dealers; however, the truth is most likely not relayed to top management by corporate ladder climbers. [¶] Mr. West, be truthful, honest and fair and we will have a most 'fruitful business' relationship."

On August 14, 1980, Wilmshurst complained to Chevrolet's general sales manager, Mr. Cook, about Chevrolet's warranty practices. He asked, "Is this the manner in which the largest manufacturing corporation in the world should treat a dealer by attempting to evade payment of a legitimate billing for work

performed. This is indeed a sad example of the misuse of corporate power."

In 1980 a controversy arose over Chevrolet's procedures for reimbursing dealers for repairs of damages done to vehicles during shipment. Under Chevrolet's procedures, the dealer submits the repair bill to Chevrolet, rather than directly to the transportation company. The transportation company then pays the amount for repair parts set by Chevrolet and Chevrolet in turn pays the dealer. Apparently unsatisfied with this procedure, Wilmshurst sent a repair bill directly to a transportation company and asked for payment "notwithstanding Chevrolet policies and procedures," because "we have had difficulty in processing and receiving payment from Chevrolet Motor Division." When the company refused to pay, Wilmshurst accused the company of illegally fixing the resale price of parts used to repair transportation damage. The company responded it was not refusing to pay but simply asking Wilmshurst to follow Chevrolet procedures. Wilmshurst responded that Chevrolet's procedures amounted to illegal price-fixing and later accused the company of participating with General Motors in illegal vertical price-fixing.

Following the first protest hearing in October, 1980, Wilmshurst's contentiousness did not abate. In February, 1981, Wilmshurst again attempted to collect on the damage bill and told the transporation company that the Board "has found for 49er Chevrolet on its petition" and if 49er did not receive a check it will bring an action for "trebble damages based upon the price-fixing element established at the Chevrolet hearings."

In fact, the Board did not determine Chevrolet engaged in price-fixing, nor was the action based on a "petition" but rather a protest. The Executive Director of the Board sent a letter to Wilmshurst cautioning him "against misrepresenting the action taken by the . . . Board" in the first hearing. The director stated, "It is inconceivable that you should attempt to use the decision rendered by the Board in a manner which distorts the nature of the proceeding and distorts the determination of the Board, in an effort to collect damages claimed to be owed to 49er Chevrolet from an entity which was not even a party to the proceedings before the Board."

In October 1980 Wilmshurst sent a message to Chevrolet's assistant zone manager stating that an overbilling appeared on the October statement of account that is in violation of Vehicle Code section 11713.3, subdivision (h). In January 1981 Wilmshurst sent a vehicle order form to Mr. West along with a message complaining about new vehicle overbilling: "As you will remember we aren't supposed to go through this hastle [sic]. The fact is your system does not work. It is illegal and it costs us unneeded expense. To this date, I have not received the credits you promised." On the form Wilmshurst attached a piece of tape with the words "red tape" written on it.

On January 23, 1981, Wilmshurst asked Mr. West to send him the forms required for requesting an increase in mechanic labor rates, stating, "Please send us the necessary (unnecessary) forms to complete so that we might advise you again that we will be raising our retail labor rate . . . . " After completing the forms Wilmshurst returned them to Chevrolet with a "red tape" sticker attached.

On the same day, Wilmshurst wrote to Mr. West to point out what he believed to be errors in Chevrolet's computation of the overbilling credits due 49er. Wilmshurst stated the credit calculated by Chevrolet "is screwed up" and Chevrolet's " 'established procedures' seem to be establishing a nightmare of accounting problems." Such problems "are all caused because Chevrolet persists in overbilling sold orders and such overbilling is against the law." Wilmshurst complained, "this is not the way for Chevrolet to run its operation. Dealers lose respect for the way Chevrolet does business when they can't even operate its own system." He closed, "[Y]ou told me we would have all the credits we had coming this month for sure and I said ho ho ho. Well, ho ho ho."

In February 1981 Chevrolet sent Wilmshurst a letter again requesting that any communications with respect to alleged illegal or unethical conduct be sent exclusively to Chevrolet's attorneys.

On March 17, 1981, Wilmshurst wrote to Mr. R. L. Cote, president of a San Diego Chevrolet dealership, about the problems of small dealerships. Wilmshurst made note of Chevro-

let's petition to overturn the first Board decision, stating, "Chevrolet's appeal indicates the willingness to invest over $1,000,000 in an attempt to put me out of business." With respect to the hearing Wilmshurst stated, "Every Chevrolet witness was exposed in not telling the truth and those that did were requested by G.M. Counsel to recant and were impeached by their own records thereafter."

In April 1981 Wilmshurst complained to Mr. Cook about the petition to overturn the Board's decision, stating, "Chevrolet does not intend to deal with 49er Chevrolet in 'good faith' and intends to injure the viability of 49er Chevrolet's business and myself personally." He stated he reviewed the testimony of Chevrolet officials at the first hearing and found it "indicate[d] that truth was not a virtue of Chevrolet's case."

At the hearing on the second protest, Mr. West testified that since the first hearing Chevrolet's relationship with 49er "is still very poor, probably the worst that I've ever seen." He testified Wilmshurst sent approximately 60 letters since the first hearing and continued to accuse Chevrolet employees of illegal and immoral conduct. Chevrolet employees refused to go to 49er's place of business without a witness.

The evidence recited above is exhaustive though not a complete recital of this voluminous record. It is sufficient to demonstrate that whatever the sincerity of Mr. Wilmshurst's beliefs with respect to the legality or morality of Chevrolet's practices, the Board and trial court properly found his conduct and manner of seeking redress was "unjustified and inexcusable" and "effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." At all times Wilmshurst has had legal channels available to him to settle his dispute with Chevrolet, both in court and before the Board. The Board is specifically empowered to hear protests by dealers with respect to the reasonableness of manufacturers' warranty reimbursements. (Veh. Code, § 3065.) Yet Wilmshurst chose to persist in a campaign of personal threats and insults against Chevrolet employees in order to coerce a change in practices. Mr. Wilmshurst's conduct rendered it impossible for Chevrolet to effectively do

business with 49er and gave it good cause for ending the business relationship.

We now consider other issues raised by 49er.

II

49er contends public policy and the First Amendment protection of free speech preclude Chevrolet from terminating the franchise in retaliation for Wilmshurst's complaints about Chevrolet's alleged criminal conduct. We need not address this issue, as 49er's poor sales performance for 1981 provides independent grounds for termination. However, we have considered the contentions and they are meritless.

With respect to the public policy argument, 49er relies on Barela v. Superior Court (1981) 30 Cal.3d 244; Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167; and Custom Parking, Inc. v. Superior Court (1982) 138 Cal.App.3d 90. These cases established only a public policy against evictions and employment terminations when they are solely in retaliation for reporting crimes to the authorities or refusing to commit crimes at the direction of a superior.

The trial court correctly observed that if all Wilmshurst had done was report illegal conduct to the press and authorities, 49er might have a legitimate argument. However, the court found Chevrolet did not terminate the business relationship simply because Wilmshurst charged it with illegal conduct. Wilmshurst's conduct went "far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing. . . . [¶] . . . Petitioner for many months, continuing long after he was requested to make his complaints as to illegality to counsel, and long after he was warned that is conduct 'disrupted the relationship' with Chevrolet, continued to engage its employees in a series of running battles over various issues . . . . [¶] . . . [Wilmshurst's] conduct here is in no way related to any responsible or legitimate effort to notify authorities, or the manufacturer or to obtain an adjudication on the merits of his complaints . . . . Instead of taking reasonable steps, [Wilmshurst] has persisted in his conduct and has created

a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause . . . is based not on the fact that [Wilmshurst] sought to 'blow the whistle' on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of . . . Mr. West, was 'probably the worst I have ever seen,' . . . "

The trial court's findings are supported by substantial evidence. Whatever role Wilmshurst's lawsuits and public statements may have had in Chevrolet's decision to end its relationship with 49er, it is clear the decision was premised primarily upon Wilmshurst's continuous campaign of personal insults and attacks against Chevrolet's employees. No public policy precludes a business from discontinuing its relationship with one who engages in such conduct.

49er next contends the termination of the business relationship contravenes Wilmshurst's First Amendment right to free speech, applied to states through the Fourteenth Amendment. Our previous discussion is applicable here. If all Wilmshurst had done was file lawsuits and make statements to the press, 49er's contention might arguably have merit. But the bulk of Wilmshurst's conduct consists of private correspondence to Chevrolet personnel accusing them of criminal wrongdoing, dishonesty and immorality. No First Amendment protection enfolds accusations that an individual has committed a crime or is personally dishonest (see Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 604), particularly where, as here, the accusations are primarily made through private channels.

In any event, the Fourteenth Amendment prohibits only state action. The termination of the relationship between Chevrolet and 49er is the result of a purely private decision on the part of Chevrolet. Although a large business "may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body", approval of a practice by the regulatory body, where it "has not put its own weight on the side of the proposed practice by ordering it," does not transmute the practice initiated by the business and approved by the regula-

tory body into "state action." (Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 357 [42 L.Ed.2d 477, 487].) Here, the state may take action with respect to the decision initiated by the automobile manufacturer only if the dealer files a protest. In the absence of a protest, the manufacturer is free to terminate the franchise without the approval of the Board. (Veh. Code, § 3060.) Chevrolet's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (Jackson, supra, 419 U.S. at p. 357 [42 L.Ed.2d at p. 487].)

Neither the First Amendment nor public policy renders an automobile manufacturer powerless to end its relationship with a dealer who subjects the manufacturer's employees to years of virulent correspondence accusing them of criminal wrongdoing and moral degeneracy.

III

49er contends the Board violated a stay issued by the First District Court of Appeal when appeal was pending from the order of the San Francisco Superior Court overturning the Board's decision in the first protest.

Before the hearing on the second protest, the First District Court of Appeal, "pending further order," "temporarily stayed" the hearing insofar as it involved "issues determined" in the Board's first hearing. The order was issued pursuant to 49er's petition for order staying the proceedings or for writ of supersedeas or prohibition. On November 17, 1981, the court issued a final order on the petition which granted the writ insofar as it requested reinstatement of the Board's first decision pending outcome of the appeal, and denied the petition in all other respects.

The issue whether the Board violated the temporary order has long since been rendered moot by the final decision of the Court of Appeal affirming the Superior Court's order granting Chevrolet's petition for writ of mandate. (Chevrolet Motor Division v. New Motor Vehicle Bd., supra, 146 Cal.App.3d 533.)

Moreover, the Board did not violate the temporary stay. 49er's sales performance was not an issue in the first hearing with respect to Wilmshurst's conduct. The Board considered *evidence* of conduct which took place before the first hearing in order to place in proper context Wilmshurst's behavior since then. Nothing in the stay order prevented the Board from considering events which transpired before the first hearing.

IV

49er next contends the standards for establishing "good cause" for termination of a franchise are not sufficiently specific for constitutional purposes. We disagree.

A statute written " 'in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " (People v. Barksdale (1972) 8 Cal.3d 320, 327; Connally v. General Construction Co. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328].) However, acts of the Legislature "come before us clothed with a presumption of constitutionality." (In re Dennis M. (1969) 70 Cal.2d 444, 453.) " 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]' " (*Ibid.*; see Lockheed Aircraft Corp. v. Superior Court (1946) 28 Cal.2d 481, 484.) All that is required is reasonable certainty and a statute will not be held void for vagueness if any reasonable and practical construction can be given to its language. (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 673; People v. Victor (1965) 62 Cal.2d 280,300; Lockheed Aircraft Corp. supra, at p. 484.)

"Good cause" is not unconstitutionally vague; it is commonly and practically used in many legal contexts. " 'The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial," and the like. Indeed, a wide spectrum of human activities is regulated by such terms . . . [y]et standards of this kind are not impermissibly

vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.' " (County of Nevada v. MacMillen, supra, 11 Cal.3d 662, 673.)

As a general standard, "good cause" may be defined as "an adequate cause," a cause that comports with the purposes of the statute and other laws. (Syrek v. California Unemployment Insurance Appeals Board (1960) 54 Cal.2 519, 529; Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55, 70.) The legislation embodying section 3061 was enacted "to promote the public welfare" by regulating the automobile sales network in California "in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Stats. 1973, ch. 966, § 1.)

Certainly inadequate sales of the manufacturer's product compared to the business available constitutes "good cause" for terminating a franchise and comports with the purpose of the statute to promote consumer welfare. This is one of the specific considerations set forth in Vehicle Code section 3061. The standard could not be more specific without making it " 'so detailed as to restrict the exercise of any real judgment by [the agency].' " (Piano v. State of California ex. rel. New Motor Vehicle Bd. (1980) 103 Cal.App.3d 412, 418.) Whether any particular level of sales constitutes "good cause" for termination of a franchise necessarily depends upon the particular facts of each case; no number standard can be established for all dealerships.

With respect to Wilmshurst's conduct, while this is not one of the considerations set forth in section 3061, those considerations are not exclusive. It is perfectly consistent with the promotion of consumer welfare to permit a manufacturer to terminate its relationship with a dealer who, through years of insults, personal charges of criminal and moral wrongoing, and uncooperativeness, has destroyed the confidence and cooperation necessary for maintaining an effective business relationship. The law cannot "require a manufacturer to entrust the marketing of its products in a wide area to a distributor with whom a relationship of confidence and cooperation has been rendered impossible . . . ." (Thayer Plym-

outh Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 304.) No more specific standard as to the conduct constituting "good cause" for termination can nor need be promulgated. As it stands, the good cause standard can be objectively applied. Any reasonable person looking at Wilmshurst's conduct would agree it provided Chevrolet "good cause" to terminate its relationship with 49er.

Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, upon which 49er relies, is inapposite. That case involved a proceeding by the State Board of Forestry to revoke the professional license of a forester for "gross incompetence." We determined the accusation did not comply with the Administrative Procedure Act because it did not specify " 'the statutes and rules which the respondent is alleged to have violated.' " (Gov. Code, § 11503.) Moreover, the agency had not adequately defined the meaning of "gross incompetence" because it had not set forth the professional duties to which that term related. (144 Cal. App.3d at pp. 527-528.)

This case does not involve an action initiated by the state to revoke a state-granted license; rather it is a private decision to cease doing business with a franchise, acquiescenced in by the state. Moreover, Government Code section 11503 does not apply to New Motor Vehicle protests. Vehicle Code section 3066, subdivision (a), specifies the Administrative Procedure Act provisions applicable to Board hearings and the only applicable provisions are those relating to discovery, depositions, evidence, affidavits, official notice, and decision. Finally, as we discussed above, the "good cause" standard is adequate in the context in which it is used.

V

49er finally contends it received an unfair hearing because the hearing officer was "obviously" biased against it. 49er bases this argument on the hearing officer's letter to Wilmshurst following the first protest in which he warned Wilmshurst against misusing or misinterpreting the Board's decision.

49er did not preserve this issue for appeal. The disqualification of a judicial officer "must be asserted at the 'earliest practicable opportunity' after learning of the grounds therefor, otherwise it is deemed waived." (Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal.App.3d 143, 150.) 49er was aware of possible grounds for disqualification long before the second hearing. Its failure to raise the issue until after the Board's decision waived the objection.

Nor has 49er failed to adduce sufficient evidence of bias. "Bias and prejudice are never implied and must be established by clear averments.' . . . [¶] Thus, our courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias." (Andrews v. Agricultural Labor Relations Bd. 28 Cal.3d 781, 792-793.)[6] The hearing officer's letter does not demonstrate actual bias; rather, in the words of the trial court, it "is forthright and factual" and "simply evidence that Mr. Jennings [the hearing officer and Executive Director of the Board] was doing his job in a business-like manner."

DISPOSITION

The judgment is affirmed.

Carr, J.

We concur:
Regan, Acting P.J.
Sims, J.

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[6] These rules apply to judicial officers in administrative proceedings. (*Id.*, at p. 794.)

Appendix B

California Vehicle Code Sections

* * *

§ 3000. *Board Created*

There is in the Department of Motor Vehicles a New Motor Vehicle Board, which consists of nine members.

§ 3010. *Quorum*

Five members of the board shall constitute a quorum for the transaction of business, for the performance of any duty or the exercise of any power or authority of the board, except that three members of the board, who are not new motor vehicle dealers, shall constitute a quorum for the purposes of Article 4 (commencing with Section 3060) of this chapter.

§ 3050. *Duties*

The board shall do all of the following:

* * *

(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060).

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of

multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3601. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board,

shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article. Dealer participation shall be recorded in the minutes of the meeting.

Appendix C

State of Rhode Island and Providence Plantations [Letterhead]

Department of Attorney General
Division of Consumer Protection
56 Pine Street
Providence, R.I. 02903

Julius C. Michaelson, Attorney General

November 17, 1977

Mr. Richard E. Wilmshurst, President
49er Chevrolet
P.O. Box 65
Main Street, Hiway 49
Angels Camp, CA 95222

Dear Mr. Wilmshurst:

I am in receipt of your letter dated November 14, 1977 in which you indicate that the warranty reimbursement issue may raise potential violations under the Sherman and Clayton act. Moreover, in our recent telephone conversation, you indicated that the 9th Circuit has recently ruled that the standard contracts used by the automobile manufacturers and dealers violate federal anti-trust law.

I am very much interested in both of these issues in that they may be the grounds for valid counter-claims in the present Rhode Island litigation. I would therefore request any and all information relative to the above issues.

Thank you very much for your information and kind courtesy. I will keep you advised of any developments in the Rhode Island federal court litigation.

Very truly yours,

/s/ GREGORY L. BENIK
Special Assistant
Attorney General

Appendix D

49er Chevrolet [Letterhead]
Telephone 209-736-2514
P.O. Box 65
Main St., Hiway 49
Angels Camp, Calif. 95222

March 17, 1978

Mr. Dan Jaffe
Senate Commerce Commission
Rm. 5202, Dirkson Senate Office Building
Washington, D.C. 20500

Dear Mr. Jaffe:

Thank you for your invitation to comment to your committee on the effects of the new car manufacturer's warranty procedures as it affects the consumer and the small businessman.

It would seem best to preface my remarks by giving your committee a short background on 49ER Chevrolet, myself and my overview of the warranty problem before going into any specifics.

49ER CHEVROLET: 49ER Chevrolet is located in the foothills of the Sierra Nevada Mountains in Northern California. The market area served contains about 17,000 people who live on 1,000 square miles that range from fifty feet to 8,999 feet above sea level. 49ER Chevrolet, formerly Wilmshurst Chevrolet Co., was established in 1933 by my grandfather and father. The dealership has been in operation for forty-five years with the exception of three years during World War II when all personnel and management enlisted in the service or worked in defense plants. The market served by 49ER Chevrolet has not increased in proportion with most markets in California and the dealership exists on customer satisfaction and repeat business.

RICHARD E. WILMSHURST: I have worked in the automobile business since 1953 when washing and servicing cars was a summer job. I attended Chevrolet Management School in Detroit, Michigan in 1958 and have purchased the ownership of the

dealership from my father (who passed away in 1963), and his partner. I am familiar with all facets of the automobile business, having worked in all departments of the business.

THE NEW VEHICLE WARRANTY SYSTEM: The causation in fact of warranty is the negligence in manufacture or design of a motor vehicle. The manufacturer's express warranty (warranty book supplied to the new vehicle purchaser) is the method of *limiting* the warranty service due the purchaser.

The dealer is the party who must meet the manufacturer's duty to the buyer in fulfilling the warranty, for the new vehicle manufacturer maintains no service shops of its own.

The agreement between the manufacturer and the dealer is known as the franchise agreement and contains the basis for warranty repair by reference to a complex Warranty Procedures Manual. The manual is designed to provide safeguards in audit control so that the manufacturer can review and pay for warranty work with all dealers in the same manner. This purpose is legitimate when the volume and complexity of the warranty *problem* is considered.

However, The Warranty Procedures Manual contains *price fixing* formulas that have escaped the application of the Federal Antitrust laws. In other industries the portion of the manufacturer's pricing of parts have been held to be a violation of Section 1 of the Sherman Act and the method of fixing the price on dealer's labor has been held to violate Section 7 of the Clayton Act. In 1974, while visiting Washington, D.C., I met with attorneys of the Federal Trade Commission and expressed my fears of the antitrust violations by the automobile manufacturers. At that time, I was advised that the budget of the Federal Trade Commission and the Justice Department would not permit an action against a major automobile manufacturer.

Since that time, the legislature of many states has heard the cry from the small automobile dealer and has enacted legislation that would have the same effect as if the Federal Government were to enforce the antitrust laws. The automobile maunfacturers are contesting the State Laws on a case by case basis; Ford and

General Motors have taken the State of Rhode Island[1] in Federal District Court in an effort to maintain their *conspiracy* to fix warranty pricing.

The major automobile manufacturers have fixed warranty compensation paid to dealers below the cost of the dealers doing the work. This effect is accomplished in three ways:

(1) Paying the dealer at a labor rate below that which he charges his retail customers;

(2) Paying the dealer for parts at a price below his cost of handling the parts; and

(3) Establishing flat rate time schedules below the time actually needed to perform the work in a *safe and efficient manner.*

THE EFFECT OF WARRANTY PRICE FIXING ON THE CONSUMER: Dissatisfaction with the retail automobile dealer and the change in purchasing habits from U.S. produced products to that of foreign manufacture.

THE DEALER AND THE CONSUMER: In many instances, the short times and low pay produce a poor quality of work.[2] In many instances, a dealer may not attempt warranty work that he

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[1] *FORD MOTOR COMPANY vs. EUGENE P. PETIT, JR.*, Registrar of Motor Vehicles, Department of Transportation of the State of Rhode Island, and JULIUS C. MICHAELSON, as Attorney General of the State of Rhode Island, Civil Action No. 77-639 (1977).

[2] The Song-Beverly Consumer Warranty Act (Cal. Civ. Code §§ 1790-1795.7 requires every manufacturer of consumer goods to designate authorized service and repair facilities reasonably close to retail outlets in order to carry out the terms of express warranties (Cal. Civ. Code § 1793.2 (a)(1). Apparently as a result of this requirement "(a) handful of large manufacturers dictate the terms of warranty service contracts with thousands of independent repair shops, and the repairman is often forced to perform warranty services below his actual costs" (Senator David Roberti, Press Release No. 49, May 12, 1976). As a result of these subcost contracts, repair shops are apparently forced to cut corners, often times causing them to "turn out shoddy work." (PACIFIC LAW JOURNAL Vol. 9 at pg. 334).

may feel is due the customer when there is a doubt that the manufacturer will pay him. In this instance the consumer may hold the dealer responsible for not making the warranty adjustment that is due.

In a closed circuit telecast at a Chevrolet meeting in San Francisco in 1975 a General Motors' (hereinafter referred to as G.M.) official stated that Chevrolet wanted the dealers to take care of the customer's warranty problem and after the dealer had performed the work, Chevrolet and the dealer could iron out who was going to pay the bill. When a dealer is not sure if he is going to get paid for work, there is a natural hesitancy to take care of the customer.

The manufacturer has used the theory that it is o.k. for the customer to become dissatisfied with the dealer as long as he goes to another dealer to buy their product. In essence, the dealer is used as the scape goat for non-warranty repair.

In some instances, since the dealer is paid below his cost to make warranty repair, and a vehicle is close to being out of the warranty period, the dealer may not make the warranty repair when it is found within the warranty period so that later he may charge the customer at his retail rate after the warranty period has expired. This practice cannot be condoned, however, the causation is the price fixing by the automobile manufacturers.

THE EFFECTS OF PRICE FIXING ON THE DEALER AND THE REPAIR INDUSTRY: When the three factors of low labor rates, no parts profit and short repair times are combined, the manufacturer in some instances has established a price for a particular warranty repair job at one-half of what the retail price would cost. This would mean that a dealer must either do a large volume of retail repairs vs. warranty work at reasonable rates or raise his retail rate to the consumer and in effect pass the cost of the manufacturer's warranty repair on the general public.

MECHANIC'S PAY: The fact that the manufacturer has fixed warranty labor rates at below retail rates and established complex procedures for a dealer to follow in order to have his labor rate increased has kept the non-union mechanic's pay below other fields that require the same technical training. The overall result

is that now there is a shortage of trained mechanics and little reason for young men to enter the trade.

The effect of the pressure by State Laws such as Rhode Island has been that G.M. has now agreed to pay its dealers for warranty repair at their *posted retail labor rate*, however, this change does not go into effect until May 1, 1978, and the dealer must suffer the results of the price fixing until that date.

PRICE FIXING AND FRAUD IN THE DEALER MANUFACTURER RELATIONSHIP: When prices are fixed below a dealers cost of providing a service the stage is set for attempted recapture of losses due to price fixing by the filing of fraudulent warranty claims. The course of conduct promulgated by the automobile manufacturer is cheat and be cheated with the dissatisfied consumer as the by-product. There is little doubt that many automobile dealers and their employees submit fraudulent warranty claims to the autombile manufacturers in an attempt to minimize their losses due to price fixing and denied warranty claims. The manufacturer makes regular audits of dealers' claim files and with regularity charges back many thousands of dollars in both unjustified and justified warranty claims.

The cheat and be cheated atmosphere has been the basis of mass firings of G.M. personnel who cooperated with dealers in cheating G.M. and in another instance where a Chevrolet employee was murdered when he was involved in a warranty audit.

49ER VS. G.M.'s WARRANTY POLICIES: We have advised G.M. by certified letter to Mr. Murphy, Chairman of G.M.'s Board of Directors, that we felt the G.M. policy was unfair and in violation of the criminal anti-trust statutes. We have been personally advised by Mr. Stacy, a vice-president of G.M., that G.M. was in fact above the law, could operate as they pleased and that it was up to anyone what wanted to risk the cost to challenge them.

49ER Chevrolet has enforced their rights to payment for warranty claims in small claims court where they have received numerous judgments that have been promptly paid by G.M. Most other dealers charge off the unpaid claims as a cost of doing business.

RETALIATION BY G.M.: In 1973 the Chevrolet Motor Division charged back in excess of $3,100.00 in warranty claims that had been paid to 49ER Chevrolet for technical reasons such as not being received within 30 days of the work being performed, wanting parts at below the cost billed, and misunderstanding by Chevrolet of work that was done on a sublet basis. We would not acknowledge the charge to our mutual account; however, it was charged back notwithstanding our assertion the claims were proper. Each month thereafter we deducted the $3,100.00 charged back when paying our open account. After a few months we were put on C.O.D. to attempt to force us to pay this unauthorized and improper chargeback. We then put G.M. on C.O.D. on warranty work and the account was thereafter opened again.

However, after that Chevrolet sent four auditors to go through our records and bring our office to a stop by disrupting our business operation; this was stopped by bringing in a T.V. station to videotape G.M.'s harassment. The G.M. auditors left with their hands covering their faces like accused criminals being brought into court for arraignment; we have saved this videotape.

In 1974 about $800.00 of the original $3,100.00 chargeback was credited back after our local court held on several occasions that even if G.M. did not receive a warranty claim at their processing center in Detroit within 30 days that G.M. still had to pay for the warranty work performed.

In August of 1977, G.M. again put 49ER Chevrolet on C.O.D. for all parts purchased as we would not pay the now $1,800.00 chargeback that we denied owing. At present, Chevrolet will not ship us any parts needed to operate our business without the libel of a C.O.D. and the additional costs incurred thereby.

We are shipped on an open account basis all advertising material and material we are forced to buy from G.M. G.M. also has over $9,000.00 as security for our account in what is known as dealer holdback; the holdback is the manufacturer's security that they will never be left with an uncollectable balance on a dealers open account.

We have been told that we will *never* be shipped any parts for our business on an open account basis until we agree to pay the warranty chargeback.

In January of 1978, our shipment of cars and trucks stopped and we had no inventory from which to operate our business. At this time, the Zone had an oversupply of cars and trucks. We wired G.M. and advised them that their acts violated § 11713.2 of the California Vehicle Code, which is a criminal statute and the flow of cars was resumed. The effect of the January shutdown of inventory was a loss of over $3,000.00.

At this point in time, we are still on C.O.D. for parts with a security deposit of $9,000.00 with G.M. and a credit balance on our account each month. (Copies of our Security Account and last months' mutual account statements are enclosed.)

EFFECT OF WARRANTY PRICE FIXING AND IMPROPERLY DENIED CLAIMS ON OUR BUSINESS: Since 49ER Chevrolet is located in an area where it cannot increase its sales volume to compensate for loss on underpaid warranty work, it must attempt to correct an inequitable and illegal system or be forced out of business.

Our service department pays its mechanics on a flat rate basis; in other words, we contract with our mechanics to do a job in the time set forth in an industry approved flat rate manual; this our mechanics accept, however, they cannot cope with the short time schedule G.M. has prepared to pay for warranty work. The effect of the G.M. flat rate manual is that we have lost our mechanics to other fields and cannot attract others to take their places.

G.M. expects us to pay a mechanic for three hours it takes him to do a job that G.M. sets the time operation at one and one-half hours; we cannot operate a business in this manner without overcharging someone to make up for the loss forced upon us by G.M.

We hope that this letter will be of some help in allowing your committee to understand what is happening to the small automobile dealer all over the United States. In 1948 there were over

49,000 retail automobile dealers in the U.S. Today there is somewhere over 24,000.

A dissatisfied consumer is the result of an unjust and illegal system of price fixing. The only reason we are fighting is the fact that our back is up against the wall. Our only alternative is to attempt to correct the illegal warranty practice or become one of those almost 25,000 retail automobile dealers who are no longer in business. Warranty is not the only illness in our business; however, it might be considered the cancer of our trade.

Very truly yours,

Richard E. Wilmshurst
President
49ER CHEVROLET

REW:sl
Encs.

Appendix E

DIVISION OF CONSUMER SERVICES [Letterhead]
Legal Services Unit
1021 O Street, Room A-602
Sacramento, California 95814
Telephone: (916) 445-5126

May 12, 1978

Richard E. Wilmshurst, President
49er CHEVROLET
P.O. Box 65
Angels Camp, CA 95222

Dear Mr. Wilmshurst:

Richard Spohn has asked me to express his and the Department's appreciation of your comments regarding the "flat rate" public hearings.

All your suggestions are interesting and valuable. Some, such as a truly independent flat rate manual, seem unlikely to be implemented due to practical problems.

I am giving serious attention to the issues you have raised regarding violations of Business and Professions Code section 17026 and 17048.5 as well as Cartwright Act violations.

Again, let me thank you for your insightful letter and participation at the Sacramento hearing.

Very truly yours,

/s/ Jeffrey Fine

JEFFREY FINE
Legal Counsel
Legal Services Unit

Appendix F

Chevrolet Motor Division
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

October 23, 1979

Office of the General Sales Manager

49er Chevrolet
P.O. Box 65
Angels Camp, California 95222

Attention: Mr. Richard E. Wilmshurst

Dear Mr. Wilmshurst:

As you know, the Dealer Sales and Service Agreement under which 49er Chevrolet is currently operating as an authorized Chevrolet dealer will expire, according to its terms, on October 31, 1980.

During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws. You have even attempted to intimidate individual employes by, among other things, accusing them of deliberate misrepresentation, fraud and criminal misconduct, and by stating to them that they are placing themselves in jeopardy merely by carrying out their job responsibilities. This course of conduct has made it extremely difficult and unpleasant for our employees to deal with you and it has eroded and ultimately destroyed the trust, confidence and respect that is essential to any productive business relationship. For these reasons, Chevrolet Motor Division will not enter into a new Dealer Sales and Service Agreement with 49er Chevrolet following the expiration of the current Agreement.

The purpose of this letter is to give you a year's advance notice of our decision in order to maximize your opportunity to sell your dealership assets or to explore the possibility of obtaining some other motor vehicle franchise. For this reason, we do not intend to

disclose our decision to any third party at this time. In addition, you should be aware that this decision is reviewable at this time pursuant to the provisions of the General Motors Dealer Relations Umpire Plan.

In the event you wish to proceed in accordance with Article IV, Section F of the Dealer Sales and Service Agreement, we will be happy to put you in touch with any qualified candidate who files or has filed an application for a Chevrolet dealership with the Oakland Zone Office. Alternatively, in the event you wish to liquidate the dealership, we are prepared to repurchase eligible items of personal property and to provide other assistance as provided for in Article IV, Sections C and D of the Dealer Agreement. Please notify us if you should want us to assist you in this fashion.

Yours truly,

R. E. Cook
General Sales Manager

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-534 (2)

In The
Supreme Court of the United States
October Term, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

vs.

NEW MOTOR VEHICLE BOARD, et al.,
Appellees.

On Appeal from the Court of Appeal of the State of California, Third Appellate District

MOTION TO DISMISS OR AFFIRM PURPORTED APPEAL

McCutchen, Doyle, Brown & Enersen

Richard C. Brautigam
(Counsel of Record)
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Telephone: (415) 393-2000

Attorneys for Appellee Chevrolet Motor Division, General Motors Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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11-19

LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Appellee Chevrolet Motor Division, General Motors Corporation lists the following non-wholly owned subsidiaries and affiliates:

Aralmex, S.A. de C.V. (Mexico)
Automotriz Gencor S.A. (Ecuador)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Compresores Delfa, C.A. (Venezuela)
Convesco Vehicle Sales GmbH (West Germany)
Daewoo Motor Co., Ltd. (Korea)
DHB—Componentes Automotivos, S.A. (Brazil)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
General Motors de Colombia S.A. (Columbia)
General Motors Egypt, S.A.E. (Egypt)
General Motors Iran Limited (Iran)
General Motors Kenya Limited (Kenya)
GM Allison Japan Limited (Japan)
GM Fanuc Robotics Corp. (USA)
Industries Mecaniques Maghrebires, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Isuzu Motors Limited (Japan)
Isuzu Motors Overseas Distribution Corp. (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Moto Diesel Mexicana, S.A. de C.V. (Mexico)
Motor Enterprises, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Suzuki Motor Co., Ltd. (Japan)
Unicables, S.A. (Spain)

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No. 85-534

In The

Supreme Court of the United States

October Term, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,

Appellants,

vs.

NEW MOTOR VEHICLE BOARD, et al.,

Appellees.

On Appeal from the Court of Appeal
of the State of California,
Third Appellate District

MOTION TO DISMISS OR AFFIRM PURPORTED APPEAL

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee Chevrolet Motor Division, General Motors Corporation respectfully moves to dismiss this purported appeal or to affirm the judgment of the California Court of Appeal, Third Appellate District in this case. The motion is based on the grounds that:

1. The appeal is not within this Court's jurisdiction (Rule 16.1(a));

2. The appeal fails to raise a substantial federal question and the judgment rests on adequate non-federal bases (Rule 16.1(b)); and

3. The purported federal question is so insubstantial that no further argument is warranted. (Rule 16.1(b), (d))

CONSTITUTIONAL PROVISIONS PURPORTEDLY INVOLVED

U.S. Const. Amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. XIV, Section 1, second sentence:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Under California law, an automotive manufacturer cannot terminate an "existing" franchisee which protests its termination until California's New Motor Vehicle Board ("Board") holds an adjudicatory hearing and finds "good cause" for the termination. Cal. Vehicle Code §§ 3060, 3066. This action is based on those state law provisions. By it, appellant 49er Chevrolet, Inc. ("49er")

claims that the Board erred in finding that appellee Chevrolet Motor Division, General Motors Corporation ("Chevrolet") had "good cause" to end its franchise relationship with 49er. The court of appeal in this case held, as had the Board and the superior court, that 49er's sales of Chevrolet vehicles were "inadequate," and that those inadequate sales, by themselves, gave Chevrolet good cause to end the franchise relationship as a matter of state law. (Jurisdictional Statement ["Jur. St."], pp. A-6-9, A-18)

The court of appeal in this case also held as a matter of state law that in the absence of a valid franchisee protest, "the manufacturer is free to terminate the franchise without the approval of the Board." (Jur. St., p. A-20) And final decisions by the Board and by the San Francisco Superior Court in other litigation between the parties conclusively establish that 49er was not an "existing" franchisee and therefore had no valid protest rights under the statute.

Faced with those rulings, 49er concocts a purported constitutional argument from the lower tribunals' additional findings that continuation of the business relationship was made "impossible" by the "unjustified and inexcusable" campaign of coercion and intimidation which 49er's owner, Mr. Richard E. Wilmshurst, had heaped on Chevrolet's employees for years. (Jur. St., pp. A-17, A-9-17) 49er says that Mr. Wilmshurst's conduct was protected by the First Amendment and that the assertion of that purported constitutional right falls within this Court's appellate jurisdiction. (*Id.*, p. 2)

This appeal ignores this Court's jurisdictional decisions which define its appellate jurisdiction and show it

to be absent; it ignores the well settled law that this Court will not review a state court judgment which rests on an adequate and independent state law ground; and it ignores this Court's constitutional decisions which prove that 49er's constitutional argument is nonexistent.

This appeal is simply an effort to prolong the inevitable. It has no more merit than the other massive litigation in which 49er has embroiled Chevrolet and which has resulted in 20-plus decisions against it.[1] The appeal is frivolous, and this Court should dismiss it or summarily affirm the judgment below.

———o———

---

[1] The 20-plus decisions against 49er have occurred in:

—yet another administrative proceeding before California's New Motor Vehicle Board (No. PR-510-83);

—two other superior court proceedings, plus 49er's unsuccessful efforts in this case to hold Chevrolet and the Board in contempt (Sacramento Superior Court No. 317790, Calaveras County Superior Court No. 12445);

—two additional appeals to the Third District Court of Appeal (3 Civil Nos. 24309 and 24893);

—an action in 49er's local small claims court (Calaveras County Small Claims Court No. 82-651);

—an action in the United States District Court for the Eastern District of California (No. 80-861-PCW);

—an action in the United States District Court for the Southern District of California (No. 82-1363-T); and

—various writ petitions in the California Courts of Appeal and the California Supreme Court.

STATEMENT OF THE CASE

This is the second time 49er has asked this Court to overturn adverse decisions respecting its loss of the Chevrolet franchise. Because that prior litigation bears on this motion, we describe it below and then set forth the facts of this litigation.

1. The First Protest.

In 1979, Chevrolet advised 49er that it would not offer 49er a new franchise agreement when the existing, five-year agreement expired by its terms a year later. (Jur. St., p. A-39) That decision was based on Mr. Wilmshurst's irresponsible and destructive conduct which had destroyed the business relationship. (*Id.*) 49er protested that decision to the Board pursuant to Sections 3060 and 3066 of the California Vehicle Code. Those sections provide that upon an "existing" franchisee's protest, an automotive manufacturer cannot terminate the franchise until after the Board holds a hearing and determines that the manufacturer had "good cause" for its action. Sections 3060(b) 3066.[2]

49er's protest was heard by a Board which included other new car dealers who had an economic interest in the decision, and that Board found that Chevrolet lacked "good cause." But even that Board found that Mr. Wilmshurst's conduct had disrupted the parties' business relationship (CT 233), and it warned 49er that it retained jurisdiction to adjudicate the reasonableness of such con-

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[2] Unless otherwise indicated, all section references are to the California Vehicle Code.

duct should Mr. Wilmshurst engage in more of it. (CT 418)

Chevrolet petitioned the San Francisco Superior Court for judicial review, and that court set the Board's decision aside. Specifically, it ruled that the Board lacked statutory jurisdiction to prevent Chevrolet's action because Section 3060's "good cause" requirements did not apply to a fixed term franchise, like 49er's, which had expired by its express terms. (App. C, p. A-43)[3] The superior court also held that the dealer members' economic interest made them biased and that their participation in the adjudicatory process denied Chevrolet due process of law. (*Id.*, p. A-42)

49er appealed, and the First District Court of Appeal affirmed on the constitutional ground. *See Chevrolet Motor Div. v. New Motor Vehicle Bd.*, 146 Cal.App.3d 533 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 1597 (1984). The California Supreme Court denied a hearing, and this Court denied a writ of certiorari. (Order, dated March

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[3] Contrary to the requirements of Rule 15.1(j), the Appendix to the Jurisdictional Statement does not include the decision of the Board or of the superior court in this case. We therefore attach them to this motion as Appendices A and B, respectively. The Appendix to the Jurisdictional Statement also fails to include (1) the superior court's decision in the First Protest, (2) the Board's dismissal of the First Protest, and (3) the First District Court of Appeal's decision dismissing 49er's petition attacking the Board's dismissal. Because they bear on this motion, we attach them as Appendices C, D and E, respectively. Finally, we attach as Appendices F, G and H the material required by Rule 15.1(j)(iii) and (iv) which the Jurisdictional Statement's Appendix omits.

Because the cost of including this material should have been borne by appellant, we request the Court to order 49er to pay appellee's cost of preparing the Appendix to this motion.

19, 1984, Nos. 83-1183, 83-1185, 83-1195) On remand, the Board followed the superior court's affirmed judgment and dismissed 49er's protest solely for its lack of statutory jurisdiction. (App. D, pp. A-45-46) 49er then petitioned the First District Court of Appeal for review, and following the court of appeal's decision in this case, the First District dismissed 49er's petition as moot. (App. E, p. A-47) 49er did not seek further review, and thus the Board's dismissal of 49er's First Protest for lack of jurisdiction is now final.

2. This Litigation; The Second Protest.

After the Board's decision in the First Protest, 49er virtually stopped selling Chevrolet vehicles and Mr. Wilmshurst continued his course of destructive conduct. Accordingly, on September 18, 1981, Chevrolet notified 49er that commencing November 30, 1981, it would cease business relations with 49er. (CT 86-87) 49er protested that decision to the Board, again claiming that Chevrolet lacked "good cause."

The Board held a hearing in which the biased dealer members did not participate, and it unanimously held that Chevrolet had "good cause" for its action.[4] Specifically, the Board found that that good cause was present both (1) because 49er's sales of Chevrolet vehicles were "inadequate" and (2) because Mr. Wilmshurst had engaged

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[4] 49er says that the evidence before the unbiased Board was the same as that before the biased Board in the First Protest. (Jur. St., p. 10, n.4) That is untrue. Although the unbiased Board took judicial notice of the records of the First Protest, it did so "in order to place in proper context Wilmshurst's behavior" since the hearing on the First Protest. (Jur. St., p. A-21)

in an "unjustified and inexcusable" campaign of coercion and intimidation which had effectively "precluded the rebuilding of any viable business relationship" between the parties. (Jur. St., p. A-9)

On 49er's petition, the Calaveras County Superior Court independently reviewed the record, applied its independent judgment, and also found that Chevrolet's action was based on "good cause." As had the Board, the superior court found that 49er's Chevrolet sales were "inadequate," and that those inadequate sales independently gave Chevrolet good cause to end the franchise relationship. (App. B, p. A-36) The court also found that Mr. Wilmshurst's destructive conduct constituted good cause. Specifically, the court rejected 49er's argument that Chevrolet had made its decision in retaliation for 49er's attempt to "blow the whistle" on Chevrolet's asserted illegality, finding that Chevrolet had acted because of 49er's "unjustified and inexcusable" conduct and manner of making accusations which had precluded the continuation of the business relationship. (App. B, pp. A-30-32)

Thus the court found that Mr. Wilmshurst's conduct went "far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing." (App. B, p. A-30) The court found that "a responsible communication of information to those who should be informed is not what we have before us here." (*Id.*, p. A-31) And the court found that Mr. Wilmshurst "contin[ued]" his irresponsible course of conduct even "long after he was requested to make his complaints as to illegality to counsel, and long after he was warned [by the Board] that his

conduct 'disrupted the relationship' with Chevrolet." (*Id.*) As the court put it:

> "Instead of taking reasonable steps, petitioner has persisted in his conduct and has created a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause, it must be emphasized, is based not on the fact that petitioner sought to 'blow the whistle' on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of Chevrolet's Zone Manager, Mr. West, was 'probably the worst I have ever seen,' (TR. p. 182) producing correspondence so voluminous that 'If we had to do that with 145 dealers, we certainly wouldn't get any other business done.' (Mr. West, TR p. 231)" (App. B, pp. A-31-32)

49er appealed, and the court of appeal painstakingly reviewed the record yet again. It affirmed the findings of "inadequate" sales performance (Jur. St., pp. A-8, A-18), holding that under the state statute "Chevrolet cannot be compelled to continue its relationship with a dealership that has virtually abandoned efforts to sell its cars . . . ." (*Id.*, p. A-8) The court also held that 49er's retaliatory termination theory was "meritless" (*Id.*, p. A-18) and concluded that Mr. Wilmshurst's "conduct and manner of seeking redress was 'unjustified and inexcusable' and 'effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel.'" (*Id.*, p. A-17) As the court of appeal explained,

> "At all times Wilmshurst has had legal channels available to him to settle his dispute with Chevrolet, both in court and before the Board. . . . Yet Wilmshurst chose to persist in a campaign of personal threats and insults against Chevrolet employees in order to coerce a change in practices. Mr. Wilmshurst's conduct ren-

dered it impossible for Chevrolet to effectively do business with 49er and gave it good cause for ending the business relationship." (*Id.*, pp. A-17-18)

The court of appeal denied 49er's petition for rehearing (App. F, A-48), and the California Supreme Court unanimously denied a hearing. (App. G, p. A-49) This purported appeal followed. (App. H, pp. A-50-51)

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ARGUMENT

I. THIS COURT LACKS APPELLATE JURISDICTION.

This Court has appellate jurisdiction to review decisions of state courts where a state statute has been challenged on federal constitutional grounds, "and the decision is in favor of its validity." 28 U.S.C. § 1257(2). 49er's purported appeal fails to meet that statute.

49er has never challenged the constitutionality of the Vehicle Code provisions, and the court of appeal did not decide that unraised issue. Instead, 49er complains only about the Board's findings of "good cause," and argues that those findings violated its constitutional rights.[5] But the Board's findings are not a "statute" within the mean-

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[5] In its opening brief to the Court of Appeal, 49er said its constitutional argument was that "The board may not make a finding supporting its decision not to grant 49er's protest in violation of 49er's right to free speech." (Opening Br., 3 Civil No. 23426, p. 94) The Jurisdictional Statement's Questions Presented likewise make clear that it is the Board's adjudicatory decision, not the state statute, about which 49er complains. In fact, those questions do not even mention the statute, let alone raise any questions as to its validity.

ing of 28 U.S.C. § 1257(2), and 49er's argument does not assert the unconstitutionality of any statute but purports to raise a "right . . . under the Constitution." 28 U.S.C. § 1257(3). Accordingly, appellate jurisdiction is absent, and review is possible, if at all, only by a writ of certiorari. *Lerner v. Casey,* 357 U.S. 468, 473, 475 (1958) (findings in employment termination case that appellant was "of doubtful trust and reliability" were not a statute making attack on them subject to appellate jurisdiction); *Hanson v. Denckla,* 357 U.S. 235, 244 (1958) (dismissing appeal where claim asserted constitutional right, not invalidity of statute); *see Lathrop v. Donohue,* 367 U.S. 820, 824-25 (1961) (Brennan, J.) (whether "statute" is challenged depends on "the character of the State's action" and requires action which is "legislative in nature").

II. REVIEW BY THIS COURT WOULD BE UNWARRANTED.

49er says this is a Supreme Court case because the lower tribunals found that Mr. Wilmshurst's "unjustified and inexcusable" conduct which destroyed the business relationship constituted "good cause" for Chevrolet's action. 49er claims that that conduct was protected by the First Amendment, that it could not constitute good cause, and that the good cause findings should therefore be overturned. (Jur. St., pp. 6-13)

There is no reason for this Court to review that purported constitutional argument. The result below rests on independent state law bases, and the asserted First Amendment argument raises no issue worthy of this Court's review; in fact, that argument is frivolous.

A. Independent State Law Bases.

The bottom line of 49er's case is that the Board should have found that "good cause" was absent and therefore should have prevented Chevrolet's action. But the "good cause" findings rest not merely on Mr. Wilmshurst's irresponsible and destructive conduct but also on independent state law grounds as to which even 49er makes no federal claim.

Thus the decision in this case holds on the merits that good cause was present because of 49er's "inadequate" sales as a Chevrolet dealer.[6] (Jur. St., p. A-18) And the final decision in the First Protest holds that the Board lacked statutory jurisdiction to prevent Chevrolet's action in any event. (App. C, D, E, pp. A-41-42, 45-47) Each of those decisions is based on state law alone; neither presents a constitutional issue; and each independently establishes that the Board properly refused to prevent Chevrolet's action.

Accordingly, this Court should dismiss the appeal pursuant to Rule 16.1(b) and decline to grant a writ of certiorari under 28 U.S.C. § 2103 pursuant to the established law that this Court will not review a state court judgment

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[6] 49er claims that inadequate sales performance was not a "real reason" for Chevrolet's decision, and it cites *Swartz v. Chrysler Motors Corporation*, 297 F.Supp. 834 (D. N.J. 1969) for the proposition that that claim presented a question to be resolved by the trier of fact. (Jur. St., pp. 12-13) But unlike *Swartz*, this case does not arise on summary judgment but after two trials on the merits, one before the Board and the other before the superior court. Those trials resulted in factual findings that 49er's inadequate sales performance subsequent to the First Protest was a legitimate and adequate basis for Chevrolet's decision.

which rests on an adequate and independent state ground. See, *e.g., Jankovich v. Toll Road Comm'n,* 379 U.S. 487, 489 (1965); *Cramp v. Board of Pub. Instruction,* 368 U.S. 278, 281 (1961); *Fox Film Corp v. Muller,* 296 U.S. 207, 210 (1935).

B. Frivolous Constitutional Claim.

49er's argument that Chevrolet's action violated its First Amendment rights is frivolous. First, there was no state action; second, even if there were, the First Amendment does not protect illegitimate or destructive conduct.

1. No State Action.

The "termination of the relationship between Chevrolet and 49er is the result of a purely private decision on the part of Chevrolet." (Jur. St., p. A-19) Accordingly, 49er has no First Amendment claim because "the Fourteenth Amendment prohibits only state action." (*Id.*)

49er recognizes that problem and tries to solve it with alchemy: It says that the Board's decision finding that Chevrolet's action was based on good cause converted Chevrolet's private action into state action. (*Id.*, pp. 8-9) But as the court of appeal correctly held, the Board's decision here did not "transmute" Chevrolet's decision into state action because it did not compel that private action but merely declined to prevent it. (*Id.*, pp. A-19-20) There is nothing remarkable about that holding; it is mandated by the decisions of this Court. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357 (1974) (state commission's failure to overturn private act not state action); *Flagg*

Bros. Inc. v. Brooks, 436 U.S. 149, 164-65 (1978) (state is responsible for private conduct if it compels it; mere acquiescence is not state action).

2. Illegitimate, Destructive Conduct.

The Petition suggests that all Mr. Wilmshurst did was to petition the government about Chevrolet's supposed wrongdoing. (Jur. St., pp. 7-8) But the uncontradicted evidence proves otherwise. That evidence is detailed in the decisions of the Board (App. A, pp. A-1-18), the superior court (App. B, pp. A-19-39) and the court of appeal. (Jur. St., pp. A-1-24)

That evidence establishes that "a responsible communication of information to those who should be informed is not what we have before us here." (App. A, p. A-31) Instead, what this case is about is Mr. Wilmshurst's deliberate decision to refuse to take his complaints to the Board or the courts which could resolve them but to use those purported claims to threaten and insult Chevrolet employees personally. (Jur. St., p. A-17) It is about his decision to take the law into his own hands and to use his law school training so that his purported claims became a means to coerce and intimidate. (*Id.*, App. A, p. A-17) It is about irresponsible conduct, about conduct which went "far beyond" anything "reasonably required," about conduct which was "in no way related to any responsible or legitimate effort" to seek redress of grievances (App. B, pp. A-30-31), about conduct which, if duplicated by others, would have brought Chevrolet's business to a standstill. (App. B, p. A-32)

The court of appeal agreed with the two lower tribunals and held that a private party has good cause to end a private contract where the other contracting party engages in illegitimate, unjustified, inexcusable and coercive conduct which makes continuation of the business relationship "impossible." There is nothing remarkable about that holding either. It is obvious. It is also fully supported by this Court's decisions which make clear that even where the First Amendment applies, it does not protect from civil consequences conduct, such as 49er's, which is not a legitimate effort to secure redress of grievances or which unreasonably disrupts working relationships. *E.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 511-12 (1972); *Connick v. Myers,* 461 U.S. 138, 149 (1983); *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968).

In short, the Jurisdictional Statement simply ignores this Court's controlling decisions which establish that 49er's purported constitutional argument is frivolous. The decision below creates no conflict in the case law, decides no important federal question on which this Court has not spoken and presents no other "special and important" consideration. Rule 17.1. Accordingly, even if the purported constitutional issue were the only issue in the case, it is insubstantial, and this Court should summarily affirm or dismiss the appeal under Rule 16.1 and should decline to grant a writ of certiorari.

———o———

CONCLUSION

This purported appeal should be dismissed or the judgment below should be summarily affirmed.

Dated: October 9, 1985.

Respectfully submitted,

McCutchen, Doyle,
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APPENDIX A

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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-348-81

In the Matter of the Protest of 49er CHEVROLET,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 11th day of December, 1981.

/s/ Kathleen O. Turner
President
New Motor Vehicle Board

1401—21st Street, Suite 407
Sacramento, California 95814
Telephone: (916) 445-1888

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-348-81

In the Matter of the Protest of 49er CHEVROLET, INC.,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

PROPOSED DECISION

Procedural Background

1. On September 18, 1981, Chevrolet Motor Division, General Motors Corporation (Chevrolet), notified 49er Chevrolet, Inc. (49er), that Chevrolet had decided that it would not do business with 49er after November 30, 1981.

2. On October 9, 1981, 49er filed a protest with the New Motor Vehicle Board (Board), pursuant to the provisions of Vehicle Code Section 3060.[1]

3. A hearing on the protest was held before Sam W. Jennings, Administrative Law Judge for the Board, commencing on November 9, 1981 and concluding on November 11, 1981.

4. Chevrolet was represented by J. Thomas Rosch and Robin Paige Donoghue of the law firm of McCutchen,

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1. All references are to the California Vehicle Code unless otherwise indicated.

Doyle, Brown and Enersen. 49er was represented by Richard Wilmshurst, president of 49er In Pro Per and by Attorney Richard A. Robyn.

Status of Prior Protest

5. The parties to this proceeding had previously appeared before the Board in connection with a prior protest, PR-271-80, filed by 49er in April, 1980 (1980 protest). The 1980 protest was filed following a notice by Chevrolet that it would "not enter into a new Dealer Sales and Service Agreement with 49er," when the then current five-year agreement between the parties expired on October 31, 1980.

6. Chevrolet moved to dismiss the 1980 protest on the ground that the Board lacked jurisdiction to hear the matter in that Section 3060 was applicable only if Chevrolet was attempting to "terminate or refuse to continue" 49er's franchise. Chevrolet contended that the franchise agreement was to terminate by its terms on October 31, 1980, and that Chevrolet was not obligated to offer a new Sales and Service Agreement to 49er. It was determined that Chevrolet's proposed action was within Section 3060, and the motion to dismiss the protest was denied at the pre-hearing conference. Chevrolet filed a Petition for Writ of Mandamus in the Superior Court in San Francisco, seeking a judicial determination that the Board was without jurisdiction. A demurrer was filed in response to Chevrolet's writ. On July 19, 1980, the Superior Court sustained the demurrer without leave to amend.

7. The Board, by its order dated January 28, 1981, sustained 49er's protest on the grounds that Chevrolet had

failed to establish good cause to terminate or refuse to continue the 49er franchise.

8. Following the Board's decision, Chevrolet petitioned the Superior Court in San Francisco for a Writ of Mandamus vacating the decision of the Board.

9. On August 20, 1981, the San Francisco Superior Court granted the Writ of Mandamus ordering the protest be remanded to the Board for disposition not inconsistent with the Court's determinations.

10. An appeal was taken from the Superior Court judgment to the Court of Appeals of the State of California in and for the First Appellate District, Division 1.

11. The Court of Appeals issued an order on November 6, 1981, which temporarily reinstated the Board's decision in the 1980 protest. The order also temporarily stayed the current protest proceedings insofar as the current protest proceedings involve issues determined in the Board's 1980 protest decision.

12. At the hearing on the current protest, filed on October 9, 1981 (1981 protest), the proceedings were limited to what has transpired since the hearing on the 1980 protest. The final day of hearing on the 1980 protest was October 8, 1980.

13. On November 17, 1981, the Court of Appeals granted the Petition for Writ of Supersedeas and/or Prohibition filed by 49er. The petition was granted to the extent that it requested reinstatement of the January 28, 1981 Decision of the Board in the 1980 protest, pending the outcome of the appeal before the Court.

Issues Presented

14. Vehicle Code Section 3061 provides that in determining whether there is good cause for refusing to continue a franchise,

> The Board shall take into consideration the existing circumstances, including, but not limited to:
>
> 1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee;
>
> 2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise;
>
> 3) Permanency of the investment;
>
> 4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted;
>
> 5) Whether the franchisee has adequate motor vehicles, sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;
>
> 6) Whether the franchisee failed to fulfill the warranty obligations of the franchisor to be performed by the franchisee;
>
> 7) Extent of the franchisee's failure to comply with the terms of the franchise.

15. Chevrolet contends that the business relationship of Chevrolet and 49er has been destroyed as a result of the conduct of 49er's principal, Richard E. Wilmshurst (Wilmshurst).

Findings of Fact

Facts Relating to the Amount of Business Transacted By 49er as Compared to the Business Available to It [§ 3061(1)]

16. In October 1980, 49er made a decision to focus its efforts on selling used vehicles rather than new Chevrolet vehicles. This decision was based upon a belief by Wilmshurst that, under the market conditions, 49er could not generate a sufficient gross profit on the sale of new Chevrolet vehicles to maintain a profitable dealership.

17. The following chart depicts 49er's Chevrolet sales performance for the first nine months of 1981 compared to the first nine months of 1980.

	49er Sales	
	1/81-9/81	1/80-9/80
Retail Car	12	32
Retail Truck	20	84
Total Retail	32	116
Fleet (Car & Truck)	2	46
Total Sales	34	162

18. The following indicates the total number of Chevrolets registered in 49er's area of sales responsibility (Angels Camp area), as well as the number of sales by 49er, for the period of January 1981 to August 1981:

	Number of New Chevrolets Registered in 49er's Area of Sales Responsibility	Number of New Chevrolets Sold by 49er
Cars	26	11
Trucks	32	18
Total	58	29

19. 49er became a Subaru dealer in May of 1981.

20. The chart below indicates the number of new cars in 49er's inventory for the months indicated.

1981	Chevrolet	Subaru
January	8	0
February	6	0
March	3	0
April	5	0
May	7	11
June	6	14
July	4	16
August	4	18
September	6	20

21. From January 1981 through April 1981, 49er spent $907 on advertising. From May 1981, when 49er acquired the Subaru franchise, through September 1981, 49er spent $3,862 on advertising.

22. From May 1981 through September 1981, 49er sold 42 new Subarus and five new Chevrolet cars.

Facts Relating to the Investment Necessarily Made and Obligations Incurred by 49er to Perform Its Part of the Franchise [§ 3061(2)]

23. 49er is a corporation, the entire stock of which is owned by Wilmshurst. Wilmshurst is President of 49er and Chairman of the Board of Directors.

24. 49er was initially incorporated in April 1960, and Wilmshurst has been president since that time. Wilmshurst was first listed as one of the owners on the Dealer's Sales and Service Agreement in 1960 and has been the only person so listed since 1965.

25. The predecessor dealer of 49er was Wilmshurst Chevrolet, a business which was owned and operated by Wilmshurst's father.

26. Wilmshurst Chevrolet and 49er have been Chevrolet franchisees for a total of 48 years.

27. No additional evidence was introduced concerning investments made or obligations incurred by 49er.

Facts Relating to the Permanency of Investment [§ 3061(3)]

28. 49er is located on approximately two acres in the community of Angels Camp. The dealership site contains a body shop, sales office, sales lot, service facility, gas station, and employee parking lot.

29. The land on which 49er is located is owned by Wilmshurst.

30. The value of the dealership land and facilities is estimated to be in excess of $400,000.

Facts Relating to Whether It is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted
[§ 3061(4)]

31. There are presently Chevrolet dealers located in Jamestown and Jackson, approximately 18 miles and 24 miles, respectively, from Angels Camp.

32. Chevrolet has entered into an oral agreement with Livery Stable Independent Service (Livery) to perform Chevrolet warranty and service repairs in the event 49er does not continue to be a Chevrolet franchisee.

33. The Chevrolet agreement with Livery is contingent upon Chevrolet discontinuing business with 49er.

34. Livery is an independent auto shop in Angels Camp, located approximately one-quarter of a mile from 49er.

35. The Livery facility has 17 service stalls. Livery's service facility exceeds Chevrolet's requirements for the area served by 49er.

36. Livery has a well-equipped service and parts department and a complete machine shop. Any Chevrolet parts not in stock can be obtained from a Chevrolet dealer within a 30-minute drive.

37. Chevrolet intends to continue having a dealership in the Angels Camp area and has contacted and interviewed three viable candidates for the dealership in the event 49er is terminated.

Facts Relating to Whether the Franchisee Has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and Has Been and Is Rendering Adequate Services to the Public [§ 3061(5)]

38. Chevrolet stipulated that it would not contest the adequacy of 49er's sales or service facilities.

39. 49er's mechanics have been trained at the General Motors Training Center to service 1982 products.

40. No additional evidence was presented.

Facts Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee [§3061(6)]

41. No evidence was presented regarding 49er's failure to fulfill the warranty obligations of Chevrolet.

Extent of Franchisee's Failure to Comply With The Terms of the Franchise [§ 3061(7)]

42. Chevrolet did not introduce evidence demonstrating 49er had failed to comply with the general terms of the franchise. However, Chevrolet contends that the entire franchise relationship has been destroyed as a result of Wilmshurst's conduct. Chevrolet's contentions will be addressed below.

Facts Relating to the Conduct of Wilmshurst and Its Effect Upon the Business Relationship of 49er and Chevrolet

43. By letter dated May 22, 1978, Chevrolet requested that Wilmshurst direct any correspondence containing references to California or federal law, or any charges of civil or criminal violations to Chevrolet's legal counsel in San Francisco. Chevrolet renewed its request in a letter to Wilmshurst dated February 27, 1981. Despite these requests, Wilmshurst, a law school graduate, continued to direct such accusations to Chevrolet's personnel.

44. On October 11, 1980, Wilmshurst sent a mailgram to John Hesler, Assistant Zone Manager for Chevrolet, regarding alleged overcharges to 49er. Wilmshurst accused Chevrolet of violating Section 11713.3(h) of the California Vehicle Code and demanded prompt payment.

45. On January 21, 1981, Wilmshurst sent a messagegram to D. S. West (West), Zone Manager for Chevrolet, regarding credits allegedly due 49er. In this correspondence Wilmshurst attacked Chevrolet's system of credits due dealers from Chevrolet because of overbilling, alleging the practice was illegal and imposed unnecessary expense on 49er.

46. In response to several of Chevrolet's letters to 49er, Wilmshurst attached a piece of red tape with the words "red tape" inscribed on it. Wilmshurst would do this when he felt the paperwork was unnecessary. This appears to be little more than an attempt to further antagonize Chevrolet and its personnel.

47. On January 23, 1981, Wilmshurst sent a letter to West, notifying Chevrolet that 49er was increasing its re-

tail labor rate. Wilmshurst requested Chevrolet send 49er the "necessary (unnecessary)" forms so that 49er could again advise Chevrolet that 49er was raising its retail labor rate. On February 3, 1981, Wilmshurst partially completed the change of warranty labor rate form, and submitted it to Chevrolet with red tape attached to it.

48. On January 23, 1981, Wilmshurst sent a letter to West regarding refunds of overbilling on new vehicles. In this letter Wilmshurst attacked Chevrolet's procedures regarding payment of credits due to dealers because of overbillings, and accused Chevrolet of illegal overbilling. Wilmshurst also attacked Chevrolet's established procedures as being ineffective, inaccurate and unworkable.

49. On April 8, 1981, Wilmshurst sent a letter to Robert E. Cook (Cook), Chevrolet's General Sales Manager, regarding Chevrolet's appeal from the Board's 1980 protest decision. Wilmshurst charged that Chevrolet's appeal would result in protracted litigation and was an intentional attempt by Chevrolet to injure 49er and Wilmshurst personally. Wilmshurst also accused Chevrolet's witnesses at the previous Board hearing of not telling the truth.

50. On July 1, 1981, Wilmshurst sent a letter to Cook regarding Chevrolet's non-payment of warranty billings by 49er. Wilmshurst accused Chevrolet of attempting to evade payment for legitimate work performed by 49er and of misusing its corporate power.

51. Between the last hearing and the present protest hearing, Wilmshurst directed approximately 60 letters to West. All correspondence from Wilmshurst was referred to Chevrolet's attorneys for responses.

52. Chevrolet personnel are reluctant to visit 49er unless accompanied by at least one other Chevrolet employee.

53. Wilmshurst engaged in the above conduct since the previous protest hearing even though he knew there were other avenues of redress available to him. Wilmshurst has pursued at least one other avenue of redress by filing an action in the United States District Court against Chevrolet on October 30, 1980. Wilmshurst sought a preliminary injunction, permanent injunction, damages, and jury trial.

54. Wilmshurst was aware that in addition to the courts, the Board's petition process is available as a forum to resolve dealer-manufacturer disputes which are not covered by the protest provisions of the Vehicle Code.

55. In addition to communications with Chevrolet's personnel, Wilmshurst also communicated to third parties concerning his disptue with Chevrolet.

56. In the following letter dated February 2, 1981, sent to Gary McCool, Claims Director, Insured Transporters, Inc., Wilmshurst represented that the Board had ruled for 49er on 49er's petition and that a price-fixing element had been established.

NEW MOTOR VEHICLE BOARD
Exhibit #9—Resp.
File No. PR-348-81

February 2, 1981
Mr. Gary McCool
Claims Director
Insured Transporters, Inc.
100 Industrial Way
Benicia, California 94510

Re: DR. 328994, I. D. #CLN 1498296118

Dear Mr. McCool:

The New Motor Vehicle Board has found for 49er Chevrolet on its Petition.

Therefore, this letter is a final billing and demand for the repairs to the above-referenced LUV truck delivered to our dealership.

Estimate of Repair	$ 960.52
Interest for one year on the outstanding amount through 1/31/81	144.08
	$1,104.60

If we are not in receipt of your check by February 15, 1981, we will bring an action in the Calaveras County Justice Court for trebble [sic] that amount, $3,313.80. We will ask for the trebble [sic] damages based upon the price fixing element established at the Chevrolet hearings.

Very truly yours,

Richard E. Wilmshurst

REW/sld

57. On February 19, 1981, the Board sent a letter to Wilmshurst, cautioning him against misrepresenting the action taken by the Board. There was no petition decision

by the Board since the petition filed by 49er was withdrawn, although a protest was subsequently heard. The Board did not make any determinations concerning the alleged price-fixing by Chevrolet, and Insured Transporters, Inc. was not a party to the 1980 protest hearing. Wilmshurst was advised that if he sought judicial relief by improperly misrepresenting the Board's action, the Board would request permission of the Court to appear to correct any misrepresentations of the Board's decision.

58. On March 17, 1981, Wilmshurst sent a letter to R. L. Cote, Jr. (Cote), President of Courtesy Chevrolet and Chairman of the Chevrolet National Dealer Council. Wilmshurst informed Cote of Chevrolet's appeal of the Board's 1980 protest decision and that Chevrolet was willing to invest over one million dollars in an attempt to put 49er out of business. Wilmshurst accused all of Chevrolet's witnesses of not telling the truth at the Board's 1980 protest hearing.

59. There were not sufficient facts established which would provide a basis for a reasonable belief by Wilmshurst that his accusations in paragraphs 43-58 above were justified.

Determination of Issues

It is determined that there is good cause for Chevrolet to "terminate or refuse to continue" the 49er franchise, in that:

(1) Chevrolet did establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er; [§ 3061 (1)]

(2) Chevrolet did not establish that 49er does not have a material investment and Chevrolet did not establish that 49er has not incurred material obligations in the performance of its part of the franchise; Chevrolet did establish, however, that the investment made and obligations incurred have been directed toward the sale of new Subaru vehicles and used cars rather than new Chevrolet vehicles; [§ 3061(2)]

(3) Chevrolet did not establish that 49er's investment is not permanent; Chevrolet did establish, however, that 49er's permanent investment is now primarily being utilized for the promotion and sale of new Subaru vehicles and used cars rather than Chevrolet products; [§ 3061(3)]

(4) Chevrolet did establish that it would not be injurious to the public welfare for the franchise to be replaced and the business of 49er to be disrupted; [§ 3061(4)]

(5) Chevrolet did not establish that 49er does not have adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of consumers of Chevrolet vehicles and did not establish that 49er has not been and is not rendering adequate services to the public; [§ 3061 (5)]

(6) Chevrolet did not establish that 49er has failed to fulfill the warranty obligations of Chevrolet; [§ 3061(6)]

(7) Chevrolet did not establish that 49er has failed to comply with the general terms of the franchise. [§ 3061(7)]

Chevrolet did establish that Wilmhurst engaged in a course of conduct attacking Chevrolet's policies and procedures as well as the conduct and character of the Chevrolet personnel charged with implementing such policies.

Since the Board's hearing on the 1980 protest, Wilmshurst has continued to engage in conduct which the Board previously found to be disruptive of the relationship between the parties. The Board's prior decision indicated that the Board did not condone the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities. In spite of the Board's statements, Wilmhurst persisted in his disruptive course of conduct.

Wilmshurst used threats of criminal, economic, and moral sanctions in his attempts to coerce and intimidate Chevrolet's personnel. Wilmshurst did this, despite the fact that he did not believe Chevrolet's personnel or practices were in any way discriminating against 49er or himself personally.

This conduct by Wilmshurst was unjustified and inexcusable in light of all the circumstances. Wilmshurst's conduct effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel.

* * * * *

The following proposed decision is respectfully submitted;

The Protest is overruled. Chevrolet has established good cause to "terminate or refuse to continue" the 49er franchise.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing had before me on the above dates at Sacramento, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

DATED: December 7, 1981

/s/ Sam W. Jennings
SAM W. JENNINGS
Administrative Law Judge
New Motor Vehicle Board

APPENDIX B

SUPERIOR COURT OF THE
STATE OF CALIFORNIA COUNTY OF CALAVERAS

No. 11169

49ER CHEVROLET AND RICHARD E. WILMSHURST,

Petitioners,

v.

THE NEW MOTOR VEHICLE BOARD,

Respondent,

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Real Party in Interest.

STATEMENT OF DECISION

Petitioner seeks review by administrative mandamus of the decision of the New Motor Vehicle Board dated 12-11-81 holding that Chevrolet had good cause to end its relationship with petitioner, and denying petitioner's protest which had been filed pursuant to Vehicle Code Section 3060. It appears that an earlier decision of the board, dated 1-28-81 is on appeal and the appellate court has issued a stay order which is an issue herein and will be discussed later.

This matter was heard on May 17, 1983, and the court issued its Tentative Decision on June 22, 1983. Petitioners 49er Chevrolet, Inc. ("49er") and Richard E. Wilmshurst filed requests for a statement of decision

on July 5, 1983. One request poses twenty-five questions; the other thirty-three. To the extent that those questions specify "principal controverted issues at trial" (CCP § 632), the factual and legal basis for the court's decision as to those issues is explained in this statement of decision.

A. Preliminary Matters.

1. Mr. Wilmshurst's Status as a Petitioner.

Administrative proceedings before the board of the type here involved are commenced when a "franchisee" files a protest. Vehicle Code Section 3060. The protest in this case was filed by 49er; Mr. Wilmshurst as an individual did not file a protest and was not a party to that proceeding. He appeared at the administrative hearing on behalf of 49er, assisted by Mr. Robyn. The petition filed with the Superior Court, initiating the present action, includes both Mr. Wilmshurst and 49er as "Petitioners" but the prayer refers only to "Petitioner".

Chevrolet has moved to dismiss Mr. Wilmshurst as an individual, asserting that since the petition seeks judicial review of the protest, and since only 49er was the protestant, only 49er is a proper party as petitioner. Counsel explained that this technical matter had seemed unimportant until a few days before the hearing when it appeared that separate counsel was to appear for 49er. The court agrees that Mr. Wilmshurst is not a proper party as an individual, and with the qualification hereafter noted grants the motion that Mr. Wilmshurst be dismissed as petitioner.

Since this issue was not raised until trial, and since various materials have been filed with the court, and the

trial itself conducted, as though there were two petitioners, the court will treat all points and authorities and any other materials which have been filed as having been properly filed on behalf of 49er, and all contentions made by Mr. Wilmshurst either in writing or in oral argument will be fully considered and their impact will in no way be diminished by the ruling that Mr. Wilmshurst as an individual is not a party. In other words, that ruling will have no effect at all on the outcome of this case insofar as 49er is concerned[1]

2. Standard of Review.

The court is satisfied that the independent judgment test is appropriate, and that the court must consider the entire record to determine whether or not the board's decision is supported by the weight of the evidence.

3. Judicial Notice.

One issue raised by petitioner should be considered at the outset, the question of judicial notice. ALJ Jennings said he would (over the objection of petitioner) take judicial notice of the earlier proceeding. The court agrees with petitioner's argument that such notice must be limited, as explained in Jefferson's Evidence Bench Book, cited by petitioner. (Vol. II, Sec. 47.2) That is, it would be improper to accept as facts in the present case all of the evidence shown in the transcript or exhibits of the earlier

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[1] One of the questions put in Mr. Wilmshurst's request for a statement of decision asks whether he was an "indispensable party to the proceeding involving the Chevrolet Sales and Service Agreement". (No. 1) As phrased, that question does not specify an issue which was tried. The issue was the one discussed in the text.

case unless such facts or exhibits were properly admissible as evidence in the present case as admissions or otherwise, or were stipulated into evidence.

Petitioner concedes that it was proper to take judicial notice of the existence of the records of the earlier proceeding (Pet. Br., p. 18), and it was not error for the ALJ to do so. Petitioner also concedes that the board could take judicial notice of the truth of its findings in its first decision. (Pet. Br., p. 18)

Unfortunately, it is unclear just what use the ALJ made of the records of the earlier proceeding. However, it does not appear that his findings or conclusions were based on any inadmissible matter.[2] And in exercising its independent judgment to determine whether the board's findings are supported by the weight of the evidence, this court has considered only evidence properly before the board in the second hearing, namely that which was admitted in evidence at the second hearing, admissions of the parties in the first hearing, and the findings of the board in its first decision.

B. The Principal Controverted Issues.

Having determined the preliminary questions, we turn now to the principal controverted issues at trial which were urged by petitioner:

1. The hearing violated the Appellate Court's stay order.

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[2] Mr. Wilmshurst's request asks whether the judicially noticed material "could have" improperly influenced the ALJ's decision. (No. 2) That academic question is not an issue in the case.

2. The decision is not supported by the weight of the evidence.

3. The decision is an unconstitutional impairment of petitioner's right of free speech.

4. The hearing officer should have disqualified himself because of actual bias.

1. *Does the action of the board violate the stay of 11/6/81?*

By its terms, the appellate court's intermediate order stays the proceedings insofar as they "involve issues determined in the January 21, 1981 decision." The order is designed to prevent relitigating issues previously "determined" in the earlier hearing which was concluded on October 8, 1980. It would not preclude determination of issues which arose after that date, and which could not therefore have been covered in the earlier decision.

To ascertain just what issues were determined in the first hearing, we must look to the language of the decision. Just as in the present case, the hearing came about because petitioner filed a protest challenging the attempt by Chevrolet to end their relationship. The relief sought by petitioner is provided for in Section 3060 et seq., of the Vehicle Code which states that "no franchisor shall terminate or refuse to continue any existing franchise" unless the board finds good cause for such action, following a hearing under Section 3066. Section 3061 lists 7 factors which may be considered in determining good cause, but the list is not exclusive. Much of the language of the 51 page decision in the first protest related to conduct of Chevrolet in its relationship to 49er over an

extended period of time. (The parties have agreed that the decision does not contain any determination that Chevrolet was guilty of illegal price fixing, TR. pp. 114, 115.) To see if the stay order was violated we must first ascertain what were (in the court's words) the "issues determined" in that decision. They appear on page 49, headed "DETERMINATION OF ISSUES." All seven of the factors listed in Section 3061 are considered and with respect to each one it is determined that Chevrolet failed to establish it.

The decision then continues: "Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and required procedures as well as Chevrolet personnel charged with implementing such policies. However, all the disputes between the parties involved, or had their origin in, Chevrolet's policies pertaining to reimbursement of 49er for sums owed to 49er by Chevrolet."

"Some of Wilmshurst's conduct disrupted the relationship between the parties. In the absence of other circumstances, Wilmshurst's conduct would be unjustified and inexcusable. However, the circumstances present here evidence that Wilmshurst had reasons for his complaints, and that his belief that Chevrolet's policies and procedures operated unfairly and illegally against his dealership was reasonable and held in good faith." (p. 50)

"Although not condoning the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities in their relationship, Chevrolet's policies and procedures, and their application to 49er, mitigate against allowing Chevrolet to terminate or refuse to continue the 49er franchise." (p. 51)

The board concluded that Chevrolet had failed to show good cause, and 49er's protest was sustained. Chevrolet obtained a writ of mandamus from the San Francisco Superior Court, and it is the appeal from that judgment which is presently pending and gave rise to the appellate court's stay order.

How do the issues determined at the earlier hearing compare to the issues now before us? Aside from the very issue we are now discussing (the scope of the stay order) the remaining issues of substance presently before us are (1) Is the decision of the board supported by the weight of the evidence, (2) Is the board's action constitutionally invalid because of the First Amendment, and (3) Is the decision invalid because of bias on the part of the ALJ?

In determining whether good cause had been established the board in the present proceeding made determinations on a number of issues (p. 16 of the decision): The amount of business transacted; the use of the permanent investment for sale of Subarus instead of Chevrolets; possible injury to public from a change of franchise; and the conduct of the petitioner since October, 1980 ("continued to engage in conduct which the board previously found to be disruptive of the relationship between the parties").

None of the issues determined at the second hearing had been previously determined by the hearing which concluded on October 8, 1980, although it does appear that with respect to some issues (e.g. decline in sales) reference was made for comparison purposes to matters prior to that date. Specifically, although Mr. Wilmshurst's conduct

prior to October 8, 1980 was an issue at the first hearing, the board did not redetermine that issue at the second hearing. Mr. Wilmshurst's conduct subsequent to October 8, 1980 was an issue determined at the second hearing, but it was not an issue at the first hearing, and the stay order does not prevent litigation before the board as to, and a board decision on, that conduct.

Contrary to what appears to be petitioner's contention, the order does not prevent consideration of any evidence of events transpiring before the first hearing; such evidence may properly be considered as background for the issues to be determined at the second hearing so long as there is no attempt at the second hearing to redecide issues which had been decided at the first hearing.

There was no such attempt: none of the board's findings at the second hearing (including Findings 43 and 44) redecided any issue which had been decided at the first hearing; and petitioner's claim that the stay order was violated must be and is rejected.[3]

2. *Is the decision of the board supported by the weight of the evidence?*

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[3] Mr. Wilmshurst's request asks whether the board's findings in its first decision respecting some aspects of his prior conduct "were justified" and would be res judicata. (No. 4) What the board previously found was not an issue which was tried. Because the board did not relitigate anything it previously found, whether those findings constitute res judicata is also not an issue which was tried.

Chevrolet argued that because the stay order on which petitioner relies was superseded prior to the board's decision, that intermediate stay order no longer placed any restraint on the board's decision making. Because the court finds that the intermediate order was not violated, it does not reach this argument.

(a) *Mr. Wilmshurst's conduct.*

Petitioner specifically refers to a number of the board's findings in support of his contention that the decision is not supported by the evidence. However, more often than not both 49er and Mr. Wilmshurst agree with the factual accuracy of the finding but argue about its significance and interpretation. Thus Finding No. 16 is not challenged, but petitioner states that it was a reasonable business decision. The factual accuracy of the following findings is not attacked: 17, 18, 19, 20, 21, 43, 44, 45, 46, 48, 49, 50, 51, 53, and 54. Accordingly, out of the more than 50 numbered findings, petitioner attacks the factual accuracy of only two, and the factual accuracy of those two findings are the only "controverted issues at trial" insofar as the court is to determine whether the findings are supported by the weight of the evidence. Those two findings are Nos. 47 and 52.

Finding No. 47. Petitioner states that it is "not supported by the record in total." A review of his comments (p. 28, Petitioner's Points and Authorities) shows that he is really arguing the interpretation of the facts, not their existence. The court finds that Finding No. 47 is supported by the weight of the evidence.

Finding No. 52. This finding is that "Chevrolet personnel are reluctant to visit 49er unless accompanied by at least one other Chevrolet employee." Attacking this, petitioner cites pages 215 and 216 of the transcript, wherein under cross-examination by Mr. Wilmshurst, Chevrolet's zone manager Mr. West testified as follows:

A. "Mr. Wilmshurst, they've lost respect completely and totally and will not go into your place of business without a witness."

Q. Mr. West, are they instructed not to go into 49er Chevrolet without a witness?

A. They certainly are.

Q. If you instruct someone to do something, can you complain about the results?

A. I don't understand your question.

Q. Okay. You're complaining that they can only go into 49er Chevrolet with a witness, and you have instructed them to do so. You could also instruct them not to, couldn't you?

A. "I'm not complaining. I'm not complaining. I state that I have told them not to go into the dealership without a witness because of the past accusations against them."

The above testimony is referred to by petitioner. But it must be considered in the light of additional testimony by Mr. West, on redirect:

Q. "Did you direct any zone employee not to visit 49er alone who hadn't told you that he didn't want to do so?

A. No, I did not."

Taking all of the above testimony together, it is the conclusion of the court that Finding No. 52 is supported by the weight of the evidence. (The court finds this conclusion is supported by common sense as well as testimony: It is simply not reasonable to believe that Chevrolet em-

ployees would enjoy the relationship they had with 49er, and it is reasonable to believe, as Mr. West's testimony indicates, that they were reluctant to make such visits unaccompanied, and that it was this reluctance which led to Mr. West to issue his instructions.)[4]

Petitioner does not really attack the factual basis of the decision. Instead, he argues that his conduct is "completely justified" as "objections to Chevrolet's criminal violations" (Petitioner's Points & Authorities, page 31). Petitioner views the case as one involving a dealer who is justifiably taking strong action in a number of ways against a manufacturer who breaks the law continually and presents perjured testimony. In petitioner's eyes, the unconscionable conduct of Chevrolet completely justifies all of his actions and Chevrolet cannot, therefore, show any good cause to end the relationship.

But the court has no evidence establishing such illegal conduct on the part of Chevrolet. Specifically, the court finds that the evidence, including Exhibit 8 and the testimony of Gary McCool, fails to show any illegal conduct by Chevrolet or any admission of illegal conduct.[5]

Moreover, the facts show that Chevrolet did not seek to terminate the relationship simply because petitioner has

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[4] Both requests (No. 7) ask whether Chevrolet employees who visited 49er after the first hearing complained of their contacts. That question, at most, refers to an argument; it does not specify an issue which was tried. The issue is whether Finding 52 is supported by the weight of the evidence, and the Court finds it is.

[5] The court also finds that the filing of a federal class action in San Diego is no evidence of illegal or wrongful conduct, much less prima facie evidence of illegality.

charged it with illegal conduct. Petitioner could have made that charge in a number of ways without disrupting the business relationship. Based on the weight of the evidence the court finds, as did the board, that Mr. Wilmshurst's conduct was "unjustified and inexcusable" and "precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." (Dec. p. 18)

In essence, petitioner's position is that where a dealer complains of illegal conduct by the manufacturer, such complaints cannot constitute good cause for ending the relationship. Such a contention might be on sound ground in some other case. For example, if the letter to Mr. Jaffe at the United States Senate (Ex. 2) complaining of Chevrolet's conduct were the cause of the termination, a serious question would be raised. A strong argument can be made that public policy should prevent the termination of a dealership solely because the dealer has complained to the wrongdoer, or has presented evidence of criminal wrongdoing to the appropriate officials.

But that is not what we have here. Petitioner's conduct goes far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing. The court assumes that petitioner would have the right to engage in reasonable conduct to notify the prosecutor, the press, the legislature, or other responsible agencies that a crime was being committed, and that the exercise of that right cannot give rise to a retaliatory termination of the dealership. (In other words, a termination in such circumstances would not be for "good cause".)

But such a responsible communication of information to those who should be informed is not what we have before us here. Petitioner for many months, continuing long after he was requested to make his complaints as to illegality to counsel, and long after he was warned that his conduct "disrupted the relationship" with Chevrolet, continued to engage its employees in a series of running battles over various issues.

If the first amendment or other public policy were to protect a leader's conduct under circumstances like this, either directly or by policy implications, the protection would be limited to such speech as might be deemed reasonably necessary to further the underlying policy. Such policy considerations argue in favor of preventing retaliatory termination where a dealer in good faith brings illegal conduct to the attention of the manufacturer, the government, or the press. But petitioner's conduct here is in no way related to any responsible or legitimate effort to notify authorities, or the manufacturer or to obtain an adjudication on the merits of his complaints. Had petitioner desired, his grievances could have been heard by a petition before the board. (62 Ops. Atty. Gen. 776, 11-30-79) They might also have been determined in other ways, such as in the federal court action now pending in San Diego. Instead of taking reasonable steps, petitioner has persisted in his conduct and has created a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause, it must be emphasized, is based not on the fact that petitioner sought to "blow the whistle" on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of Chevrolet's

Zone Manager, Mr. West, was "probably the worst I have even seen," (TR p. 182) producing correspondence so voluminous that "If we had to do that with 145 dealers, we certainly wouldn't get any other business done." (Mr. West, TR p. 231)

There is no evidence here of illegal conduct by Chevrolet. Even if there were such evidence, it would not *automatically* follow that termination was improper. If good cause is established for termination, and it appears that the termination was not merely a retaliatory move because of allegations of unlawful conduct, then termination should be upheld. That is, if there is adequate basis for termination wholly aside from a retaliatory move, and if the termination is in good faith based upon such other grounds, then the critical questions is not whether Chevrolet had engaged in unlawful activity, but rather whether or not Chevrolet had established good cause for the termination.

The requests for a statement of decision filed by Mr. Wilmshurst and 49er contain a number of questions about Mr. Wilmshurst's destructive conduct.[6] None of them specify an issue which was tried. The issue was whether the weight of the evidence demonstrated that Mr. Wilmshurst's conduct, taking into account the context in which it occurred, including Chevrolet's conduct, constituted good cause for Chevrolet's decision to end the business relationship. The court finds it does. The court, however, will go on and address the arguments raised by those questions.

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[6] 49er Request Nos. 4, 10, 11, 13, 14, 20, 21, 24, 25, 26, 28, 29, 33; Wilmshurst Request Nos. 10, 11, 13, 14, 20, 21, 24, 25.

(1) *Chevrolet's conduct.* Several questions[7] ask about Chevrolet's conduct, and whether the court considered it. The subject matter of those questions is involved in this case only to the extent that it relates to petitioner's apparent argument that Chevrolet's actions constituted a justification for petitioner's destructive conduct. The court has considered Chevrolet's conduct; finds that it provides no justification for petitioner's destructive conduct and specifically finds, as did the board, that petitioner's conduct was "unjustified and inexcusable".

(2) *Specific acts.* Some questions[8] ask the court what particular conduct would constitute good cause. Those questions fail to understand the board's decision and the court's role in reviewing it. Neither the board nor the court was called on to decide whether "particular" incidents, if they had occurred alone, would constitute good cause. The job of both the board and the court was to find whether the conduct which did in fact occur, taken together, constituted good cause. As explained above, it did.

(3) *Mr. Wilmshurst's beliefs.* Two questions[9] ask about the reasonableness of Mr. Wilmshurst's beliefs. To the extent they refer to conduct involved in the first hearing they are not relevant here. To the extent they relate to the conduct involved in this hearing, the court finds, as did the board, that Mr. Wilmshurst lacked a reasonable be-

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[7] 49er Request Nos. 10, 13, 24, 25, 27, 28, 33; Wilmshurst Request Nos. 10, 24, 25.

[8] 49er Request No. 11; Wilmshurst Request Nos. 11, 13.

[9] 49er Request Nos. 4, 29.

lief that his conduct and method of making accusations were justified. (Dec. Finding 59; see p. 21, below)[10]

(4) *Hypothetical questions.* Several questions[11] ask about complaints by victims of wrongdoing and a franchisor's response to them. For reasons given above those hypothetical and argumentative questions do not relate to this case. The court has dealt above with the issues tried in this case to which petitioner presumably intends those questions to relate.

(b) *Petitioner's sales performance and use of investment.*

Petitioner challenges the board's determination that 49er's permanent investment is now used primarily for the sale of Subarus and used cars. In support of his contention petitioner refers to the sums invested in car and truck parts. But this is not a "permanent" investment. The court finds that the weight of the evidence does support the decision in its determination that the "permanent" investment—i.e., the dealership facilities and good will—was used primarily for used cars and Subaru sales rather than Chevrolet sales.

Petitioner has also raised a question with respect to the board's conclusion (p. 16) that "Chevrolet did establish that the amount of business transacted by 49er was inadequate as compared to the business available to 49er." (V.C. Sec. 3061(1)) Petitioner argues that here the

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[10] This finding is not crucial to the board's or the court's decision. The issue is Mr. Wilmshurst's conduct, not his subjective state of mind.

[11] 49er Request Nos. 14, 20, 21, 26; Wilmshurst Request Nos. 14, 20, 21.

board considered only new vehicle sales, whereas it should have considered service, sale of parts, and of used cars, in determining the "amount of business" as that term is used in the statute.

The disputed language appears in a section which does not purport to be an exclusive listing of factors to be considered, but rather recognizes the existence of possible additional factors not enumerated. None of these factors is said to be controlling in itself. Presumably, the board could have set up as a factor not otherwise listed one specifically relating only to the sales of new vehicles, and such a consideration would be properly before the board in making its determination of "good cause". Therefore, it makes little difference what the legislature meant when it put together its nonexclusive list of existing circumstances for the board to "take into consideration". It is quite clear that the board was using only new vehicle sales and since Vehicle Code Section 3061(1) gives it the right to consider new vehicle sales as a factor in determining good cause, the decision cannot successfully be attacked on this ground. The real question is, was there sufficient evidence so that the court, exercising its independent judgment, can say that the decision was supported by the weight of the evidence? In making this determination the court is not confined to the seven items listed in V.C. 3061(1).

In any event, taking the language in context and having in mind the essential purposes of the legislation, it appears that the legislation was referring to new vehicle sales. Finally, it should be noted that the board did have before it facts relating to sales of parts and used cars as well as the data on new vehicle sales. (p. 13)

Petitioner also argued that its decision to use its permanent investment for the sale of used cars and Subarus and not Chevrolets was a reasonable business judgment. But the issues concern the use of petitioner's permanent investment and the adequacy of its Chevrolet sales performance, not the reasonableness, from petitioner's point of view, of its decision to essentially cease selling Chevrolet vehicles. Even if petitioner believed it could make more money by selling vehicles other than Chevrolet products, that does not makes [sic] its inadequate Chevrolet sales performance adequate; indeed, it emphasizes the presence of good cause for Chevrolet's decision to end the business relationship.[12]

Petitioner has also argued that economic conditions were a factor in its sales performance, and four of the questions in the requests relate to that argument.[13] The court has taken the facts respecting those arguments into account. The court finds that the weight of the evidence demonstrates that petitioner's Chevrolet sales performance was "inadequate as compared to the business available" to it (Dec., p. 16) and that that inadequate sales performance independently demonstrates "good cause" for Chevrolet's decision.

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[12] Two of the questions in the requests relate to whether it was reasonable for 49er to take on a new line of cars. (49er Request No. 16; Wilmshurst Request No. 16) Those questions do not relate to the issues tried for the reasons stated in text and also because neither Chevrolet's action nor the board's decision was predicated on petitioner having taken on a new line.

[13] 49er Request Nos. 15, 22; Wilmshurst Request Nos. 15, 22.

(c) *Miscellaneous.*

As to all of the board's findings of fact, whether or not specifically questioned by petitioner, the court finds that they are supported by the weight of the evidence, except as to Finding No. 59. This finding would be supported by the evidence if it were reworded to replace the word "accusations" with the words "conduct and method of making accusations." This does not change the ultimate outcome but does more accurately state a conclusion that the weight of the evidence will support. (This makes clear that petitioner could reasonably have thought it proper to continue to protest and accuse, provided it was done in a reasonable manner.) The court finds that Finding No. 59, as thus amended, is supported by the weight of the evidence.

4. *Should the hearing officer have disqualified himself because of actual bias?*

The only evidence of bias offered is the letter directed to the petitioner, which was Exhibit 10 at the board hearing. That letter is forthright and factual. Considering the circumstances under which it was written it is not evidence of bias but simply evidence that Mr. Jennings was doing his job in a businesslike manner. The fact that he wrote such a letter in his capacity as Executive Secretary some eight months before the hearing does not as a matter of law disqualify him. Specifically, the court finds that the use of that letter in Finding 57 is not evidence of bias and was not testimony at the hearing.

Furthermore, the facts with respect to Mr. Jennings' role as Executive Secretary, and in particular the letter

from Mr. Jennings to petitioner, were well known to petitioner at the start of the hearing.[14] Any objection to the qualifications of the hearing officer, either because of his dual role, or because of the episode of the letter, should have been made on the record at the time. The facts were well known to petitioner then. Instead, petitioner waits until an adverse decision is reached and *then* urges that some other judge should have heard the case.

While the statutes and case law with respect to judicial disqualification may not expressly apply to an administrative proceeding, they are helpful authority here. One of the most basic principles, which rests upon simple fairness, is that one who is well aware of possible grounds for disqualification cannot sit back and gamble on a favorable outcome and then, if the result is not favorable, claim a right to a new hearing on the grounds of bias which had not previously been objected to. (Witkin, Vol. I, California Procedure, pages 364-366) So here, even if it is assumed petitioner's objections were well taken, which they were not, the failure to raise them until after the decision is fatal.

The Decision was Supported by the Weight of the Evidence.

The various findings have been considered, and those specifically referred to by petitioner have been discussed, and the court has concluded that the findings are (with

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[14] Specifically, the court finds that neither the board nor Mr. Jennings was obligated to announce prior to the hearing that Mr. Jennings would be the hearing officer. (See 49er Request No. 2) His role was known then; no objection was raised.

the one exception noted) supported by the weight of the evidence. Based on the findings, the board concluded that good cause has been shown for terminating the relationship with petitioner. The court agrees with the conclusion of the board.

The determination of the board that there was "good cause" for termination is supported by the weight of the evidence. The petition for peremptory writ of mandamus is denied. Judgment to be prepared by Real Party in Interest.

Dated: September 19, 1983.

Richard E. Tuttle
Judge of the Superior Court

APPENDIX C

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NO. 26

Honorable Frank W. Shaw, Judge

No. 777974

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Petitioner,

vs.

THE NEW MOTOR VEHICLE BOARD,

Respondent,

49er CHEVROLET,

Real Party
in Interest.

MINUTE ORDER

1. Prior to its amendment in 1979, California Vehicle Code Section 3001 mandated that four out of nine members of the New Motor Vehicle Board be new car dealers. Vehicle Code Section 3060, provided that a dealer franchise may not be terminated unless the board finds good cause for said termination. Vehicle Code Section 3066, provided that a hearing must be held when a protest is registered to the proposed termination of a franchise.

In the case of *American Motors Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal.App.3d 983, the court held that Vehicle Code Sections 3060 and 3066 were unconstitutional in that they were violative of due process

under California Constitution, Article I, Section 7, and under the Fourteenth Amendment to the United States Constitution. The court held that "the combination of (1) the mandated dealer-Board members, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors*, supra, p. 992.)

The court further stated that dealer members of the Board have an economic stake in every franchise termination case that comes before them and that it is sufficiently clear that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.

In 1979 the legislature amended the vehicle code to provide that "a member of the Board who is a new motor vehicle dealer may participate in . . . hear . . . and comment or advise other members upon, but may not decide, any matter involving a protest" against termination by a manufacturer. (Vehicle Code Sections 3050(d), 3066(d)). According to Senate Bill No. 417, which introduced these amendments, such dealer participation was required to provide educated and needed advice to the Board.

The question presented to the Court in the case at bar is whether said amendments cured the constitutional infirmity found by the court in *American Motors*. This court holds that the 1979 amendments to the Vehicle Code do not cure the unconstitutionality of the earlier provisions of the statute. Although American Motors is not, in this

Court's judgment, dispositive of the issue as to whether or not full participation by dealer-Board members in the hearing process but without the right to vote is unconstitutional, it is the opinion of this court that the participation of dealer-Board members provided for by the 1979 amendments is also unconstitutional under the rationale of American Motors, and for the primary reason that, even though the dealer-Board members no longer have the right to vote, they nevertheless have the opportunity to otherwise fully participate in the adjudicatory process, whereas the manufacturers are left unrepresented, thus depriving the manufacturers of an impartial tribunal. This statutory procedure is clearly violative of due process and is therefore unconstitutional.

It is this Court's opinion that the case of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, does not overrule the Court of Appeals decision in *American Motors.* The interest involved in the decision making process in the case at bar consists of the dealer-Board members' economic interest in the cases being decided. The plurality opinion in Andrews specifically distinguishes the situation where such an economic interest exists, and states that bias is presumed in that situation.

a. Petitioner did not waive its right to raise its constitutional claims in this court by omitting to make those claims before the Board. Petitioner's challenge was directed to the constitutionality of the New Motor Vehicle Board's enabling legislation, and, as such, was properly made in the trial court. Petitioner could not raise its claim before the Board, because an administrative agency created by the legislature has no power to declare a state statute unconstitutional.

2. As a second ground for granting the writ of mandate, this Court adopts the language of *Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435, and finds that it applies to the case at hand insofar as it holds that in order to have a termination of an existing franchise, a franchisee must have some period of time remaining on his written agreement, and that there can be no wrongful refusal to continue an existing franchise unless the franchisee had some contractual right to continuation. In the present case, Petitioner did not deprive the real party in interest of any time remaining on its current Dealer Sales and Service Agreement, nor did it refuse to continue any agreement which gave the real party in interest a right to a continuation.

The *Witt* case points out the stark reality that if this Court were to adhere to the interpretation of Vehicle Code Section 3060, which Respondent argues is correct, it would engraft on the franchise agreement a continuing term that could never be terminated except for one or more of the "good cause" conditions enumerated in the section. Thus, a lease with a definite term and no right to continue could become a contract in perpetuity. This Court finds that the legislature did not intend such a drastic amendment to contractual rights and duties between parties to such a contract when it enacted Vehicle Code Section 3060.

Therefore, the Court finds that the Board acted in excess of its jurisdiction in the case at bar.

3. For the foregoing reasons the Petition for Writ of Mandate is granted.

4. No findings of fact and conclusions of law, as provided by Rule 232 of the California Rules of Court, are re-

quired in the case at bar. The Court is deciding this case solely on the above enumerated grounds, both of which were decided by this Court as a matter of law. Attorney for Petitioner shall prepare a form of judgment consistent with the Court's order in accordince [sic] with Rule 232 of the California Rules of Court.

DATED: 7-31-81.

/s/ Frank F. Shaw
Judge of the Superior Court

APPENDIX D

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

Protest No. PR-271-80

In the Matter of the Protest of 49er CHEVROLET,

Protestant,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

ORDER OF DISMISSAL

PURSUANT TO THE Minute Order dated July 31, 1981, and Judgment dated August 20, 1981, of the Honorable Frank W. Shaw, Judge of the Superior Court of the State of California, City and County of San Francisco, in the matter of *Chevrolet Motor Division, General Motors Corporation* vs. *New Motor Vehicle Board;* 49er Chevrolet, Real Party in Interest; Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers Association of Southern California, Inc., Additional Real Parties in Interest (San Francisco Superior Court No. 777974) (*49er Chevrolet* vs. *Chevrolet Motor Division, General Motors Corporation,* Protest No. PR-271-80), the New Motor Vehicle Board hereby sets aside its Decision

of January 28, 1981, rendered in the above-entitled Protest, and dismisses said Protest for lack of jurisdiction.

DATED: January 5, 1984

NEW MOTOR VEHICLE BOARD

By /s/ Robert J. Beckus
Robert J. Beckus
Public Member
New Motor Vehicle Board

APPENDIX E

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION THREE

A025621

San Francisco County
Superior Court No. 777974

49er Chevrolet, et al.,

Petitioners,

vs.

The New Motor Vehicle Board,

Respondent,

General Motor Division, etc.,

Real Party in Interest.

BY THE COURT:

The petition for writ of mandate is denied as moot. (White, P. J., Scott, J. and Merrill, J. participated in the decision.)

Dated: May 17, 1985

White, P. J.

APPENDIX F

IN THE
COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

3 Civil 23426
CALAVERAS 11169

49ER CHEVROLET and RICHARD E. WILMSHURST,
Plaintiff and Appellant,

v.

NEW MOTOR VEHICLE BOARD
Defendant and Respondent

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Real Party in Interest and Respondents.

By the Court:

Appellants' petition for rehearing is denied.

Dated: March 29, 1985.

CARR, Acting P. J.

APPENDIX G

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

3nd [sic] District, Civil No. 23426

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

WILMSHURST etc.,

Petitioner,

v.

NEW MOTOR VEHICLE BOARD,

Respondent;

CHEVROLET MOTOR DIVISION OF
GENERAL MOTORS CORP.,

Real Party in Interest

Petition for review DENIED.

/s/ Broussard
Acting Chief Justice

APPENDIX H

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President
49er Chevrolet
1103 Main Street
Angels Camp, CA 95222
Telephone: (209) 736-2514

IN THE COURT OF APPEAL OF THE
STATES OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 Civil No. 23426
Superior Court No. 11169

49ER CHEVROLET and RICHARD E. WILMSHURST,

Petitioners and Appellants,

v.

NEW MOTOR VEHICLE BOARD,

Respondent,

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that 49er Chevrolet and Richard E. Wilmshurst, appellants above-named, hereby appeal to the Supreme Court of the United States from the denial of a hearing by the Supreme Court of the State of California in the proceeding *Richard E. Wilmshurst, et al v. New Motor Vehicle Board et al,* 3 Civil 23426, sustaining the judg-

ment of the Calaveras County Superior Court, denying appellants a Writ of Mandamus, filed March 4, 1985, by the Court of Appeal and hearing denied by the Supreme Court of the State of California on May 15, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2) by way of appeal.

49er Chevrolet

by /s/ Richard E. Wilmshurst
Pro Se

Dated: July 12, 1985

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-534

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

VS.

NEW MOTOR VEHICLE BOARD, et al.,
Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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No. 85-534

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

VS.

NEW MOTOR VEHICLE BOARD, et al.,
Appellees,

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

Appellants, Richard E. Wilmshurst and 49er Chevrolet (49er), hereby submit their brief in opposition to the motion to dismiss filed by the Chevrolet Motor Division, General Motors Corporation (GM), which was adopted by the Attorney General of the State of California by letter to the Clerk of this Court.

GM dealers have long operated under the ruthless policies of General Motors with the fear of franchise termination the means of control. The first time GM's activities were brought to public light, and the dealer's subservient position vindicated, was in a criminal trial in Indiana where GM was found guilty of criminal conduct.[1] If a dealer speaks out about GM's policies that may be

[1] The record of the first New Motor Vehicle Board (Board) hearing reflects horror stories similar to those in the government's case in *United States v. General Motors Corporation, et al.* (1941) 121 F.2d 376. In

wrongful or illegal he takes the chance of destroying the relationship through what GM terms "destructive conduct." GM requires that a GM dealer unequivocally follow its policies right or wrong, or be subject to franchise cancellation.

Thirty-nine years later, this Court reflected on the dominant position of the automobile manufacturer and the arbitrary rules, established by the manufacturer, by which the parties must do business in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 101.[2]

The basis of our freedom of speech is the right to address government with wrongs that are taking place within our society. The manner in which consumer warranty is handled is of great public and governmental interest. Information on whether price-fixing is illegal or produces an unfair burden on the dealer and, indirectly affects every GM car owner adversely, should be free to flow between dealer and consumer groups, government and GM employees responsible for the application of the illegal or unfair policies without fear of franchise loss.

GM dealers throughout the United States dare not speak out to the press or government against the policies of GM without the fear of the destruction of their dealerships through franchise termination.

The right of this group of businessmen to be able to speak freely about policies of GM that may adversely affect not only each dealer but the general public is of national importance.

U.S. v. GM, Chevrolet's policy in Southern California was to force dealers to adhere to GM's policies or it would get another dealer. (P.392-393) The court found that GM felt the dissenting dealers "disrupted" the relationship as Chevrolet argues in this proceeding.

[2] In *Fox*, this Court cited excerpts from the 1956 Congressional Committee Report relating to the domination of the dealer by the manufacturer and, in actuality, its economic captive. The automobile manufacturer has a poor record for being fair with its dealer, for by 1978, the Federal government and 25 states enacted legislation to protect dealers from the oppressive and abusive acts of the automobile manufacturer.

The federal question in this proceeding affects every franchisor and franchisee within the United States and should be fully briefed and argued so that this Court may establish a guideline for the protection of financially-dominated franchisees who exercise their First Amendment rights.

ARGUMENT

I

THIS COURT MAY REVIEW THIS PROCEEDING UNDER ITS APPELLATE JURISDICTION

This Court may review this proceeding under its appellate jurisdiction by way of the "good cause" standard concerning the speech of 49er or from the order of the Board finding 49er's speech "good cause" for revoking 49er's California vehicle license to sell new Chevrolet products.

California Vehicle Code (CVC) § 3061 provides:

> "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to . . . "

The California Legislature gave the Board the authority to establish other than the seven listed standards when it required review of the seven listed standards but ended the required review with "but not limited to. . . ".

In *Hamilton v. University of California* (1934) 293 U.S. 245, 257, 258, this Court held that orders of state agencies are considered statutes under 28 U.S.C. § 1257(2).

In this proceeding, the Board's act of establishing a "good cause" standard, one not expressly found in CVC § 3061, was state action. When this new standard adopted by the Board was applied to 49er's protected speech, this was also state action and is reviewable on appeal by this Court.

This Court held in *Williams v. Bruffy* 96 U.S. 176, 183:

> "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court."

II

THE INADEQUATE SALES ISSUE WAS PLACED AT ISSUE BY GENERAL MOTORS IN THE SECOND HEARING AFTER THEY LOST THE FIRST HEARING BASED ON THE RECORD WHERE 49ER'S EXPRESSION WAS ADMITTEDLY GM'S SOLE REASON FOR TERMINATION

As 49er pointed out at Page 12 (Jur.St.) *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corporation* (1980) 627 F.2d 44 establishes the standard for intent and timing of reasons for franchise termination.

Mr. Cook's termination letter of October 23, 1979, lists only 49er's complaints in regard to Chevrolet's conduct within the franchise relationship.

As a *fortiori,* the statement of Mr. Cook under cross examination in the first hearing stated 49er's termination had nothing to do with the performance of the dealership in the marketplace (Appendix G, P. A-41, A-42) which was, in fact, very satisfactory when the termination letter was sent in 1979. Mr. Cook specifically stated 49er's expression about Chevrolet was the sole reason for termination.

Counsel for GM foresaw the First Amendment issue, after the first hearing, and inserted a reduction in car sales as an additional reason in the second termination letter in an attempt to prevent First Amendment review.

III

THE "GOOD CAUSE" STANDARD ADOPTED BY THE STATE OF CALIFORNIA VIOLATES THE STANDARDS ESTABLISHED BY THIS COURT FOR FIRST AMENDMENT EXPRESSION IN COMMERCIAL FREE SPEECH AREAS OF BUSINESS RELATIONS

49er made a strong and concerted effort to effect change in GM's policies that were unfair and illegal. It is true that 49er communicated its displeasure to the government and GM. 49er's efforts did not exceed the standards of persuasion approved for automobile manufacturers when attempting to persuade dealers to its way of thinking. In *Bob Maxfield, Inc. v. Amercian Motors Corp.* (1981) 637 F.2d 1033, 1037 the court held:

> "A manufacturer may use strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce his retailer to buy its full line of products."

The key to GM's real concern can be found at Page 14, Motion to Dismiss, where the fear that other dealers would follow 49er's expression of dissatisfaction with GM's policies that could bring GM's business to a standstill. At least to a standstill until proper changes could be instituted by GM.[3]

GM and the State of California contend at Page 15, Motion to Dismiss, that even though the First Amendment "might" apply, the State was free to adopt "good cause" standards that would allow franchise termination by one of the largest corporations in the world against a small franchisee who objected to the manner in which the giant did business. Even though this meant violating the First Amendment rights of that franchisee.

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[3] On examination of Mr. Cook, a question was asked with regard to Mr. Wilmshurst's election to the Chevrolet Dealer Council. Mr. Cook answered that Mr. Wilmshurst was elected to represent his fellow dealers by his peers or other dealers. It is obvious that Chevrolet was concerned by the fact that Mr. Wilmshurst's ideas were embraced by other Chevrolet dealers so much so that he was elected to the Council by them. (Appendix G, P. A-42)

In *Organization For A Better Austin v. Keefe* (1971) 402 U.S. 415 this Court held, even if speech was intended to have a coercive impact, it is not removed from First Amendment protection. As a further standard, the Court found that one party may find offensive another party's comments on their conduct, however, so long as the means are peaceful, the communication need not meet standards of acceptability.

At GM's suggestion, the Board adopted a standard for 49er's speech. At Page 15, Motion to Dismiss, GM refers to the standard of speech that is "illegitimate, unjustified, inexcusable and coercive" and makes the "continuation of the business relationship impossible." A standard of this type was struck down in *Cohen v. California* (1971) 403 U.S. 15.

The cases cited by GM and adopted by the State of California do not apply to the circumstances or relationship of the parties in this proceeding.[4]

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[4] *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 does not apply to a franchisor/franchisee relationship and holds that First Amendment rights are not immunized from regulation when an integral part of the conduct violates a valid statute. That is not the case here. The holding in *Connick v. Myers,* 461 U.S. 138 would apply only to an employee/employer relationship. In the franchisor/franchisee relationship the franchisee is an independent, commercial business and is not subject to the restraints and duties of an employee.

CONCLUSION

Beyond question, this case raises substantial national issues of first impression involving not only fundamental constitutional rights of appellant, but also of numerous other similarly situated franchisees whose petitions to the government and complaints to their respective franchisors have not been heard due to the "chilling effect" of potential franchise cancellation. The Court should deny the motion to dismiss, note probable jurisdiction, and grant plenary consideration of this appeal.

Dated: October 31, 1985

Respectfully submitted,

RICHARD E. WILMSHURST
Appellant, pro se

(Appendix G follows)

Appendix G

HEARING
STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
Protest No. PR-271-80
In the Matter of the Protest of:
49ER CHEVROLET,
Protestant,
vs.
CHEVROLET MOTOR DIVISION
GENERAL MOTORS CORPORATION,
Respondent.
1401 21st Street
Sacramento, California
VOLUME V
Thursday, September 4, 1980

Excerpts of the Cross Examination of Robert E. Cook, Vice President of the General Motors Corporation at page 719 and 720

Wendy E. Stewart
C.S.R. No. 4355

MR. ROSCH: Assumes a fact not in evidence, namely that there was a positive side to the relationship. I'll object on that ground.

ADMINISTRATIVE LAW JUDGE SKROCKI: Why don't you lay some foundation. Was there anything positive about the relationship between 49er Chevrolet and Chevrolet Motor Division?

THE WITNESS: Not the business relationship.

ADMINISTRATIVE LAW JUDGE SKROCKI: *Was there anything positive about the job that Mr. Wilmshurst through 49er Chevrolet was doing for the Chevrolet Motor Division?*

THE WITNESS: *Yes. The performance of that dealership in the marketplace is very satisfactory.* (Emphasis added)

MR. HEISER: Q. Wouldn't you consider that a positive side of the relationship?

ADMINISTRATIVE LAW JUDGE SKROCKI: I'm sorry. Had you finished your response, sir?

THE WITNESS: No. That was all I was going to say about that. I'm sorry, Mr. Heiser.

MR. HEISER: Q. I asked you whether you would consider that a positive side of the relationship.

A. It would be so minimal in being weighted against the other aspects of it that it doesn't count at all. The issue that we were addressing was not Mr. Wilmshurst's performance in the marketplace. It was the items that I mentioned earlier,

and I guess I'd have to say in all honesty that if he were doing twice or three times the job he's doing now, we still would not wish to continue to do business with him.

ADMINISTRATIVE LAW JUDGE SKROCKI: You were asked whether you sent a letter of congratulations when Mr. Wilmshurst was appointed to the Dealers Council. Are dealers appointed or are they elected?

THE WITNESS: They are elected by their peers, by other dealers.

ADMINISTRATIVE LAW JUDGE SKROCKI: They are not appointed by Chevrolet Motor Division?

THE WITNESS: No.

MR. HEISER: Thank you for that clarification, your Honor.

Q. So, in other words, you did not take into consideration the dealership's performance in making your decision.

A. It was noted. It was noted in the deliberations. *As I said, it's inconceivable to imagine a better job that he could do that would prompt us to want to do business with him.*

Q. You indicated that another factor was that he, I think, demanded deviations from your rules, the way you do things. Is that correct?

A. Yes.

Q. What deviations was he demanding?